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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 191[illegible].

No. [illegible]

JOHN HARTON PAYNE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

CENTRAL PACIFIC RAILWAY COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 31, 1921.

(25968)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920

No. ~~509~~. 17

John Barton Payne ~~FRANKLIN K. LANE~~, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

CENTRAL PACIFIC RAILWAY COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Transcript of record from the Supreme Court of the District of Columbia.	1	1
Caption	1	1
Bill of complaint	1	1
Exhibit A. Certificate of G. L. King, Jan. 15, 1910	11	11
B. List of lands in Reading district, etc	11	11
C. Deposition of B. A. McAllaster	12	12
D. Register's certificate, Feb. 21, 1910	12	12
E. Register's certificate, Mar. 5, 1910	12	13
Rule to show cause	13	14
Marshal's return	14	14
Return to rule to show cause	14	14
Motion to dismiss	14	15
Opinion	15	16
Decree discharging rule; sustaining motion to dismiss bill and dismissing bill; appeal noted	17	17
Assignments of error	17	18
Designation of record on appeal	19	19
Memorandum: Bond on appeal for $100 approved and filed	19	20
Clerk's certificate	19	20
Minute entry of argument, etc	21	21
Opinion, Van Orsdel, J	22	21
Judgment	40	32
Petition for appeal	41	33
Assignment of errors	43	34
Order allowing appeal	46	36
Citation and service	47	36
Clerk's certificate	48	36

1 Court of Appeals of the District of Columbia.

No. 3012.

CENTRAL PACIFIC RAILWAY COMPANY, etc., Appellant,
vs.
FRANKLIN K. LANE, etc., et al.

Supreme Court of the District of Columbia.

In Equity. No. 33481.
CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill of Complaint.

Filed June 3, 1915.

In the Supreme Court of the District of Columbia.

In Equity. No. 33481.

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court:

The plaintiff respectfully represents:

1. That it is a body corporate, duly incorporated, organized
2 and existing under and in accordance with the laws of the State of Utah; and brings this its bill of complaint against Franklin K. Lane, a citizen of the State of California, residing in the District of Columbia, and Clay Tallman, a citizen of the State of Nevada, and residing in the District aforesaid, in respect of the matters and things hereinafter set forth.

2. That, at the several times hereinafter referred to, the defendant, Franklin K. Lane, was, and he still is, Secretary of the Interior Department of the United States, and as such, has charge of the administration of the laws of the United States relating to the public lands, and the administration of all land grants made by Congress including any portion of said public lands; and that the defendant, Clay Tallman, was, and he still is, Commissioner of the General Land Office of the United States, the latter being one of the branches of said Department of the Interior, having immediate charge of the matter of the administration of the public lands of the United States, and of land grants made by Congress, said Commissioner acting therein under the direction, supervision and approval of the Secretary of the Interior; and that each said defendant is sued in his official capacity as such Secretary of the Interior and Commissioner of the General Land Office, respectively, as hereinafter set forth.

3. That, by act of Congress, approved July 25, 1866, (14 Stat. 239) entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland in Oregon," authority was given to the California and Oregon Railroad Company, a corporation organized and existing under the laws of the State of California, to construct a railroad and telegraph line under certain conditions and stipulations as expressed in said act; and by the second section of said act a grant of land was made to certain corporations named in the act, including specifically said California and Oregon Railroad Company, said grant being thus:

"And be it further enacted, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, other lands designated as aforesaid, shall be selected by said companies in lieu thereof; under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. * * *"

And by section four of said act, it was thus provided:

"And be it further enacted, That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissioners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued."

And section five of said act provided in part:

"And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States."

And by section six of said act, it was provided:

"And be it further enacted, That the said companies shall filed their assent to this act in the Department of the Interior within one year after the passage thereof and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same *gague* (gauge) as the 'Central Pacific Railroad' of California, and be connected therewith."

4. That said California and Oregon Railroad Company duly accepted the grant so made to it in said act, and duly filed its assent in that behalf; and, thereafter, duly constructed and completed a line of railroad from Roseville, California, to the California-Oregon State line, within the time limited therefor, (as extended by a certain further act of Congress, approved June 25, 1868, 15 Stat., 80).

5. That said California and Oregon Railroad was fully constructed, completed, and equipped, and accepted by the President of the United States, after sworn report by commissioners, as required by the granting act aforesaid, and each, every and all of the

4 conditions, sipulations and requirements of said land grant were and have been fully met and satisfied.

6. Plaintiff further shows that the line of railroad so constructed by the California and Oregon Railroad Company, as above, connected, at Roseville, California, with the line of railroad of the Central Pacific Railroad Company, of California, said last-named corporation being one of the companies named in said act of July 25, 1866; and that, thereafter, to wit, June 28, 1870, certain articles of agreement were entered into, under and in conformity to the laws of the State of California, by and between said Central Pacific Railroad Company of California and Western Pacific Railroad Company, a California corporation, whereby said two Companies became amalgamated and consolidated, under the name and style of Central Pacific Railroad Company; that thereafter, to wit, on August 22, 1870, certain further articles of agreement were entered into under and in conformity to the laws of the State of California, by and between said California and Oregon Railroad Company and said Central Pacific Railroad Company, whereby said two companies became amalgamated and consolidated, under the name Central Pacific Railroad Company; duly certified copy of such articles of consolidation, thereafter, having been duly filed in the said General Land Office; and by reason of all whereof, the said Central Pacific Railroad Company became the legal successor in interest of all the rights, titles, properties, and franchises of the corporations named, including the certain land grant so made to the California and Oregon Railroad Company, by the act of July 25, 1866, supra.

7. And plaintiff further shows that, subsequently, to wit, July 29, 1899, said Central Pacific Railroad Company executed a deed of conveyance to the Central Pacific Railway Company, the plaintiff herein, of all of its rights, titles, properties, and franchises, including the land grant so made to the California and Oregon Railroad Company, supra, whereby plaintiff company has succeeded to all of the rights, titles, and interest therein and thereto as so heretofore granted by Congress, as hereinabove set forth; and, thereafter, to wit, March 8, 1900, (29 L. D., 589) the then Secretary of the Interior of the United States directed the issuance of land patents in the name of plaintiff company, as such successor, as aforesaid, on account of the land grants made to the Central Pacific Railroad Company, by the acts of Congress, approved July 1, 1862, (12 Stats., 489), and July 2, 1864, (13 Stat., 356), and to said California and Oregon Railroad Company, by said act of Congress, approved July 25, 1866, (14 Stat., 239).

8. That, by the provisions of a certain other act of Congress, approved March 3, 1887, (24 Stat., 556), the Secretary of the Interior was "authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted;" and although the fact is that the railroad of said California and Oregon Railroad Company, provided for in the granting act of July 25, 1866, supra, has long since been fully constructed, completed, equipped and operated for a great many

5 years, with all of the incidental benefits to the United States, as fixed and provided by said granting act, the land grant itself remains unadjusted.

9. Plaintiff further shows that in the adjustment of the land grant of said California and Oregon Railroad Company, so now owned by plaintiff, as successor, as aforesaid, divers losses have been sustained of lands within the place limits of the grant, by reason and because of the certain prior rights and claims to individual tracts within the place limits, as set forth in section 6, of said act of July 25, 1866, supra, and hereinabove set forth; thereby making it necessary for plaintiff company, as such successor in interest, as aforesaid, from time to time, to make selections of lands within the limits of said indemnity grant in order to make up losses so sustained of lands within the place limits of said grant; and in this connection plaintiff says that if the available indemnity lands shall be permitted to be devoted by the Secretary of the Interior to other purposes adverse to the grant it will be impossible in large part hereafter to make up the deficiencies of losses of lands within the place limits of the grant. Plaintiff shows further that within the place or granted limits of said grant there is a present ascertained loss of several thousand acres of land by reason of said land being found to have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of at the date of location of said road opposite the lands so lost to said grant; that in addition to said ascertained loss there is a further known loss of unsegregated place lands for the reasons above stated of many hundred acres and that in the further adjustment of said grant further losses within the place limits will almost certainly be discovered; that the extent of such further loss cannot be definitely or even approximately ascertained at this time.

10. That the granting act of July 25, 1866, supra, constituted a contract between the United States and said California and Oregon Railroad Company, the indemnity grant therein contained being as much a part of said contract itself as the primary grant therein and thereby made; and said granting act and contract conferred and was intended to confer upon the grantee, California and Oregon Railroad Company (including the plaintiff herein as its lawful successor in interest), a substantial right to the amount of lands within the indemnity limits prescribed by said granting act, necessary to fill the loss to the grant of lands within place limits; and while the indemnity lands so granted by the act above mentioned are required to be selected under the direction of the Secretary of the Interior the authority of the Secretary is limited to the exactions found in said granting act, namely, that at the date of the indemnity selection of any particular tract or tracts of land, tendered to and certified by the local land officers, there existed no adverse claim to or reservation of the land selected; that the land is not known to contain mineral of value, and that good and valid base is offered for the indemnity selection; no discretion or authority being vested in said Secretary by the provisions of said act of July 25, 1866, supra, either to

6 lessen, impair, or defeat said indemnity grant, either in whole or in part, by devoting such indemnity lands to other uses and purposes adverse to the grant.

11. That, notwithstanding full performance on the part of said railroad grantee, as above, plaintiff is limited in its selection of indemnity lands to such thereof as have been surveyed; that certain areas of said indemnity lands now otherwise available for selection by plaintiff remain unsurveyed, thus preventing selection thereof by plaintiff until after the survey thereof shall have been made and the official plat thereof filed in the local land office of the district wherein the lands are situate when it is required to make formal presentation of its claim at such local land office through selection; while settlements by individuals are permitted to be made upon unsurveyed lands falling within the indemnity limits aforesaid, such settlements being given precedence over plaintiff's selections filed upon survey, as above.

12. That in addition to claims of individuals initiated through settlement upon said indemnity lands while unsurveyed, as above, the land grant aforesaid has been and is being further sought to be lessened, impaired, and defeated, in large part, by the creation of public reserves of divers kinds; and this too even in respect of lands embraced in a pending indemnity selection awaiting formal approval for patent, as hereinafter more fully set forth.

13. And plaintiff shows that, on February 24, 1910, it filed its certain indemnity selection list No. 28 in the local land office at Redding, California, serial 01667 (now Sacramento serial 05361), the same embracing, inter alia, the N. E. ¼ N. W. ¼ S. E. ¼ and S. ½ S. E. ¼ of section 5, township 32 north, range 9 west, Mount Diablo, meridian, California, assigning good, sufficient, and valid base therefor of tracts in equal area lost to plaintiff within the primary or place limits of the certain grant aforesaid, the same being duly specified and set forth in said list of selections, and which list of selections was accompanied by the fees collectible by law and otherwise met in every requirement the rules and regulations of the Department of the Interior in respect of making and filing railroad indemnity selection lists; and said selection was duly certified by the register and receiver of said local land office under date March 5, 1910.

Plaintiff attaches hereto, and asks that the same be taken and considered as a part hereof, true and correct copies of the several certificates and vacant, unappropriated, and nonmineral affidavit filed in support of the above indemnity selection list and also of the two certificates of the local land officers attached thereto, certifying to the sufficiency and validity of the base lands offered for the indemnity selection and to the legal availability of the indemnity lands so selected; the same being marked exhibits A, B, C, D and E, respectively.

14. And plaintiff further states that the above described lands, so sought in indemnity selection by it, are parts of an odd-numbered

section within the limits of the indemnity grant so contained in said act of July 25, 1866, supra; and that, at the date of filing said list of selections in the local land office, as aforesaid, the same were
7 vacant, unoccupied, unappropriated lands, nonmineral in character, and free and clear of and from the claim of any person whomsoever, and were not embraced in any reservation theretofore made either by the President of the United States, by Congress, or by any of the Executive departments of the Government of the United States; and the tracts aforesaid were and are needed by plaintiff in partial satisfaction of the grant aforesaid.

15. Plaintiff further states that, in accordance with the rules, regulations, and practice of the Department of the Interior, said local land office duly transmitted said certified selection list, along with the monthly returns from said local land office, to the Commissioner of the General Land Office for appropriate consideration and ultimate patenting of the lands embraced therein to plaintiff.

16. And plaintiff says that while the certain indemnity selection list aforesaid was so certified by the local land officers on March 5, 1910, and, thereupon, forwarded to the Commissioner of the General Land Office for appropriate action and disposition, as above, no action was had thereon, so far as the certain tracts aforesaid are concerned when, on November 25, 1911, power-site reserve No. 232 was ordered created and established, by Executive order of that date, and, thereafter promulgated as an attempted withdrawal of the lands included therein by General Land Office letter "F", of December 9, 1911, said Executive order having been given and made under the assumed authority of the provisions of a certain act of Congress, approved June 25, 1910 (36 Stat., 847), and which attempted withdrawal aforesaid included the certain tracts hereinabove described.

That said act of Congress approved June 25, 1910, is in words following, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

"Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates; Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearings lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occu-

pant or claimant shall continue in diligent prosecution of said work. And provided further, That this Act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands
8 after any withdrawal of such lands made prior to the passage of this Act: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

17. And plaintiff shows that, thereafter, and on January 16, 1915, the defendant, Commissioner of the General Land Office, by his office letter "N", held for rejection and cancellation plaintiff's indemnity selection of the certain tracts aforesaid, upon the ground, and upon that ground only, that said tracts had been included in the above power-site reserve No. 232 of November 25, 1911 (the attempt to create and establish the same, however, having been made long subsequent to the indemnity selection thereof by plaintiff, as above stated).

Said defendant, Commissioner of the General Land Office, in further support of his ruling aforesaid, cited what is known as administrative ruling, made by the defendant, Secretary of the Interior, July 15, 1914 (reported in 43 Land Decisions of the Department of the Interior, at page 293), and wherein said defendant, Secretary of the Interior, maintains the right, assumed to have been conferred by the above act of June 25, 1910, to withdraw, inter alia, selected railroad indemnity lands at any time prior to the approval by him of such pending selections.

18. Plaintiff duly appealed from the decision of the defendant, Commissioner of the General Land Office, to the defendant, Secretary of the Interior, assigning, as error, the following:

In holding for cancellation the selection of said tracts because of power-site reserve No. 232, made by Executive order of November 25, 1911, letter "F", December 8, 1911, this under the assumed authority of administrative ruling of July 15, 1914 (43 L. D. 293), the latter being based upon the authority supposed to be found in the act of Congress of June 25, 1910 (36 Stat. 847).

Error in holding that the company's right to said indemnity lands, which was secured to it by a solemn contract between it and the Government and where the railroad grantee has long since fully performed its part of the contract and fully earned its land grant, can now be impaired or defeated by the Government in attempting to devote the lands so granted to some other purpose or use adverse and hostile to the railroad grantee.

9 Error in holding that the Government, by the establishment of power-site reserves, or otherwise however, can deprive the railroad grantee of its land grant, either in whole or in part.

But plaintiff says that said Secretary, by his decision dated March 30, 1915 (promulgated April 5, 1915), affirmed the said decision of the commissioner as to the tracts mentioned, his full decision in respect of said tracts and of the question raised upon said appeal being thus:

"Upon this appeal it is contended that administrative ruling of July 15, 1914 (43 L. D. 293), is erroneous, and that no part of the land involved in said list should be canceled because included in power-site reserve 232, as stated and held by the commissioer.

"The record has been examined, and the facts are found to be as stated in the commissioner's decision. No further discussion as to said administrative ruling is considered necessary. Suffice it to say that such rule is adhered to, and the decision of the commissioner is affirmed so far as certain portions of the land involved are eliminated from the railway selection list."

19. That plaintiff, thereupon, and within the time therefor limited by the regulations and rules of practice of the Department of the Interior, filed motion for rehearing of the certain departmental decision aforesaid; but the same was thereafter, on the 27th day of May, 1915, overruled and denied by the defendant, Secretary of the Interior, and the record in said case returned, or is about to be returned, to the defendant, Commissioner of the General Land Office, for the purpose and with directions to make final the said decision adverse to plaintiff company, to finally reject plaintiff's indemnity selection of the tracts aforesaid, and to close the case.

20. And plaintiff says that it has now completely exhausted its rights of appeal, review, and rehearing in said Department of the Interior and in said General Land Office, in respect of its claim to said tracts of land, and that no further opportunity for hearing or review of the question aforesaid, or for the further assertion therein of its claim to said tracts of land, is afforded by the regulations and rules of practice of said department, or by any law or act of Congress in such case made and provided; and that its only remaining remedy is by appropriate appeal to the courts for relief from the rulings aforesaid, and which rulings, as plaintiff is advised by counsel, and, accordingly, so avers, are erroneous in matter of law.

21. Plaintiff states that, by full construction of the railroad provided for by the certain granting act hereinabove mentioned, and otherwise fully complying with the terms, conditions, and exactions

thereof, the right and title to the lands embraced in this suit has been fully earned, and that the same are needed in partial satisfaction of said grant; but that nevertheless the right of plaintiff in the premises is sought to be defeated by the unauthorized and arbitrary action of the defendants, as herein aforesaid.

22. And plaintiff further states that if the certain action hereinabove set forth be permitted to stand, it will deprive plaintiff of a valuable part of the land-grant so heretofore made by Congress, as aforesaid, and for which the United States received valuable consideration; will be in violation of the statutory contract accomplished and effected by said granting act of July 25, 1866, supra; will limit and, to the extent of the tracts of land described, will defeat the will of Congress as expressed in said grant, and this, too, after the said grantee has performed in full the several conditions in consideration whereof the grant was made; and will further result in the unlawful taking of the private property of this plaintiff for public use without compensation, and without the consent of plaintiff, and to its irreparable loss, damage, and injury, and for which plaintiff has no adequate remedy at law and is otherwise remediless except in equity.

Wherefore, premises considered, the plaintiff prays:

1. That the process of this court issue directed to the defendants, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, requiring them, and each of them, to appear and make answer unto the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this bill or at such short day thereafter as shall be fixed by the court a preliminary order may issue herein restraining and enjoining, pendente lite, the defendants, their successors in office, and each, every and all persons claiming to act under their, or either of their, authority or control, from enforcing any or either of the certain rulings, holdings, and decisions mentioned and complained of in the foregoing bill of complaint or from canceling or rejecting the certain indemnity selection so heretofore made by plaintiff of the N. E. ¼ N. W. ¼ S. E. ¼ and S. ½ S. E. ¼ of section 5, township 32 north, range 9 west, Mount Diablo meridian, California.

3. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendants, commanding and requiring that each of the certain rulings, holdings, and decisions aforesaid be vacated and set aside, and that the right granted and secured to plaintiff under the certain granting act herein aforesaid be recognized, respected, and given its full legal force and effect, excluding from any and all consideration in connection with plaintiff's indemnity selection of the tracts aforesaid the certain power-site reserve referred to in the foregoing bill of complaint.

4. And that plaintiff may have all such other and further relief as the nature of its case may demand and require and as may be agreeable to equity.

CENTRAL PACIFIC RAILWAY COMPANY,
[SEAL.] By WM. F. HERRIN, *President.*

Attest:
G. L. KING, *Secretary.*
A. A. HOEHLING, Jr.,
Attorney for Plaintiff.

11 The defendants to this bill of complaint are—
1. Franklin K. Lane, Secretary of the Interior.
2. Clay Tallman, Commissioner of the General Land Office.

EXHIBIT A.

Office of the Central Pacific Railway Company.

SAN FRANCISCO, CALIFORNIA, *January 15, 1910.*

I, G. L. King, Secretary of the Central Pacific Railway Company (successor to "The Central Pacific Railroad Company of California" and "The California and Oregon Railroad Company"), hereby certify that B. A. McAllaster was appointed Land Commissioner of the said Central Pacific Railway Company, by the Board of Directors of said Company, at a meeting held on the twenty-sixth day of September, 1908, which appointment was made effective from the twenty-first day of September, 1908, and that since that time he has been continuously, and is now, the Land Commissioner of the said Company.

In testimony whereof, I have hereunto set my hand and affixed the Corporate Seal of the said Company, this 15th day of January, 1910.

[Corporate Seal.] G. L. KING,
Secretary of the Central Pacific Railway Company.

EXHIBIT B.

List of Lands in the Redding Land District, California, Selected by the Central Pacific Railway Company, Successor to "The California and Oregon Railroad Company."

The undersigned, the duly authorized Land Commissioner of the Central Pacific Railway Company (successor to "The Central Pacific Railroad Company of California" and "The California and Oregon Railroad Company"), under and by virtue of the Act of Congress, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July 25, 1866, and the act amendatory thereof, approved June 25, 1868, and under and in

pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said Central Pacific Railway Company, successor to the said "The California and Oregon Railroad Company, as inuring to it, and to which it is entitled, under and by virtue of the said act of Congress and the act amendatory thereof, and in virtue of the location of the line of route of the said railroad and telegraph line of said California and Oregon Railroad Company.

B. A. McALLASTER,
Land Commissioner of Central Pacific Railway Company.

12 EXHIBIT C.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

B. A. McAllaster, being duly sworn, deposes and says: I am the Land Commissioner of the Central Pacific Railway Company. The foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Central Pacific Railway Company (successor to "The Central Pacific Railroad Company of California" and "The California and Oregon Railroad Company"), under and by virtue of an act of Congress entitled "An act granting land to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866, and the act amendatory thereof approved June 25, 1868. The said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands and are of the character contemplated by the granting act, lying within the limits of thirty (30) miles on each side of the line of route of the said railroad.

B. A. McALLASTER.

Subscribed and sworn to before me, this 15th day of January, 1910.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT D.

United States Land Office.

SACRAMENTO, CAL., *Feb. 21, 1910.*

We hereby certify that we have carefully examined the records in this office as to the lands described in Redding Indemnity List No. 28 of the Central Pacific Railway Company, successor to "The California and Oregon Railroad Company," alleged to be lost within the

20-mile limits of its grant in the Sacremento Land District, and we find that each and every tract of said land in said list is within the 20-mile limits of said grant, and has been lost to it in place as alleged therein.

JOHN F. ARMSTRONG, *Register.*
JOHN C. ING, *Receiver.*

EXHIBIT E.

United States Land Office.

REDDING, CALIFORNIA, *March 5th, 1910.*

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Central Pacific Rail-
13 way Company (successor to "The Central Pacific Railroad Company of California" and "The California and Oregon Railroad Company"), and selected by B. A. McAllaster, the duly authorized Land Commissioner of the said company, and have tested the accuracy of the same by the plats and records of this office, and that we find the same to be correct.

We further certify that the lands described are surveyed, lie within the limits of thirty miles on each side of the line of route of said railroad, and that no part of the same is returned or denominated as mineral land, claimed as swamp land, or covered by any homestead, preemption, State, or other valid claim on file or of record in this office.

We further certify that the said Land Commissioner has paid to the undersigned, the receaver, the sum of one hundred twenty-eight ($128.00) dollars, in full payment and discharge of fees of register and receiver on said list, and that the said list has been filed and approved.

C. W. LEININGER, *Register.*
L. L. CARTER, *Receiver.*

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a notary public in and for the District aforesaid, personally appeared A. A. Hoehling, jr., who, being by me first duly sworn, on oath, says: that he is attorney for the Central Pacific Railway Company, a corporation, duly created, organized, and existing under the laws of the State of Utah, said corporation being the plaintiff named in the foregoing and annexed bill of complaint; that he has read the foregoing bill of complaint and is acquainted with the contents thereof, and that the several matters and things therein set forth and contained are true, as he verily believes.

A. A. HOEHLING, Jr.

Subscribed and sworn to before me this 3d day of June, A. D. 1915.
[SEAL.]
RAYMOND B. DICKEY,
Notary Public, D. C.

Rule to show cause.

Filed June 3, 1915.

* * * * * * *

Upon consideration of the bill of complaint herein, and upon application in that behalf made, it is, by the court, this 3d day of June, A. D. 1915, ordered:

That Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, defendants, show cause to this court if any they have, on Friday, the 18th day of June, A. D. 1915, at 10.00 o'clock a. m., why preliminary injunction and restraining order should not issue as prayed in said
14 bill of complaint; provided, a copy of said bill and of this rule to show cause be served upon said defendants, respectively, on or before the 11th day of June, A. D. 1915.

WALTER I. MCCOY, *Justice.*

Marshal's Return.

Served a copy of the within rule on Franklin K. Lane and Clay Tallman personally June 3, 1915.

MAURICE SPLAIN, *Marshal.*
S.

Return to Rule to Show Cause.

Filed October 15, 1915.

* * * * * * *

Come now the defendants in the above-entitled cause, by their attorneys, and by way of return to the rule to show cause why preliminary injunction and restraining order should not issue as prayed in the bill of complaint, say that they elect to stand upon those matters of law set forth in their motion to dismiss the bill herein filed.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney.

Motion to Dismiss.

Filed October 15, 1915.

* * * * * * *

Come now the defendants in the above-entitled cause, by their attorneys, and move to dismiss the bill herein filed; and for cause, show:

1. That the plaintiff has not in or by its bill exhibited a cause for the relief prayed for or for any relief in equity.

2. That as appears on the face of the bill the land selected and demanded by the plaintiff is public land of the United States reserved and withdrawn by order of the President of the United States as a power-site withdrawal made by him pursuant to an act of Congress.

3. That under the law said withdrawal or reservation remains in full force and effect until revoked by the President or by act of Congress; and that under the law authorizing the reservation or withdrawal of land for the purpose and in the manner in which the
15 land in controversy in this cause was withdrawn or reserved, Congress has enumerated the class of claims and those only which Congress excepted from the effect of such withdrawals; and that among the exceptions so enumerated, to wit, in the act of June 25, 1910, set out in paragraph 16 of the bill, railroad selection lists—or lands scheduled for selection by any railroad under any railroad land grant—are not excepted.

4. That under existing law no right to land within the indemnity limits of its grant vests in the plaintiff under any selection thereof made by it under the authority of any act of Congress, until such selection has been duly approved by the Secretary of the Interior; and that as to the land selected by the plaintiff as set forth in the bill herein filed, the Secretary of the Interior by operation of the Executive order duly made by the President of the United States, withdrawing said land from settlement, location, sale, or entry, is, and since November 25, 1911, has been without any authority to approve the selection list filed by the plaintiff in so far as it includes the land described in the bill aforesaid.

5. That the relief sought or any substantial relief that, premises of the bill considered, the court could extend, would involve judicial interference with, and control of, a matter within the exclusive jurisdiction of the Secretary of the Interior, and involving the exercise of his judgment and discretion.

6. That legal title to the land is and remains in the United States and that upon the question as to whether it is now donated and withdrawn for public purposes of the United States by virtue of the Executive order of the President or belongs to the plaintiff by some character of title which plaintiff may be heard to assert in a court of law or equity, the United States is entitled to be heard, is a neces-

sary party to the suit, and has not been made a party herein, nor, furthermore, has it, in this behalf, consented to be sued.

Wherefore they pray that the bill may be dismissed with their reasonable costs, and that they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney.

Opinion.

Filed July 24, 1916.

* * * * * * *

The plaintiff filed a list of selections of lands within the indemnity limits specified in its grant to take the place of lands lost within the primary limits. Thereafter Congress passed the act approved
16 June 25, 1910 (36 Stat. L. 847), authorizing the withdrawal of lands for power-site reserves. The land in question having been withdrawn in pursuance of the statute, the Secretary of the Interior refused to approve of plaintiff's list of selections.

The Supreme Court said, in Wisconsin R. R. Co. vs. Price County, 133 U. S. 496, 513, referring to opinions of attorneys general:

"The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made, and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior."

In Sjoli vs. Dreschel, 199 U. S. 564, 565, the court said:

"From the numerous cases in this court relating to the above act of July 2, 1864, the following propositions are to be deduced: * * *

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior.

"That up to the time such approval is given lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preemption and homestead laws of the United States; * * *."

This language was quoted with approved in Osborn vs. Froyseth, 216 U. S. 571, 578. In Stalker vs. Oregon Short Line, 225 U. S. 142, 149, the court says:

"The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases it has been many times ruled that while no vested right against the United States is acquired until the actual approval of the list of selections, the company does acquire a right to be preferred over such an intervenor. In other words, the patent, when issued, relates back to the initiatory right and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in Weyerhaeuser vs. Hoyt, 219 U. S. 380, and we can add nothing to the conclusiveness of that case."

In view of these positive statements by the Supreme Court and especially because of what is said in Stalker vs. Oregon Short Line, supra, the court feels constrained to hold that the bill must be dismissed.

On these authorities the motion to dismiss is sustained. Serve copy of proposed decree with two days' notice of settlement.

By the court:

WALTER I. McCOY, *Justice.*

17 *Decree.*

Filed July 26, 1916.

* * * * * * *

This cause came on to be heard on defendants' return to the rule to show cause and upon the motion to dismiss plaintiff's bill of complaint, and was argued by counsel; whereupon, on consideration thereof, the court having been fully advised in the premises, it is, this 26th day of July, 1916,

Ordered, adjudged, and decreed, That the rule to show cause herein issued, be, and the same is hereby, discharged, that the motion to dismiss be, and the same is hereby, sustained, and that the bill of complaint herein filed be, and the same hereby is, dismissed, with costs to the defendants to be taxed by the clerk.

By the Court:

WALTER I. McCOY, *Justice.*

From the foregoing decree, plaintiff prays an appeal in open court to the Court of Appeals, and the same is hereby allowed; and the appeal bond for costs is fixed at $100, or a deposit of $50, in lieu thereof.

By the Court:

WALTER I. McCOY, *Justice.*

Assignments of Error.

Filed July 26, 1916.

* * * * * * *

The appellant, Central Pacific Railway Company, a corporation, hereby designates the following assignments of error in the certain final decree of the court, entered in the above-entitled cause, July 26, 1916, dismissing the bill of complaint filed therein by plaintiff:

1. In failing to find and hold that a grant made by the Congress of the United States to aid in the construction of a railroad is not a gratuity but a contract; and, that by constructing the road and putting it in operation, the grantee performed its part of the contract and became entitled to performance by the Government.

2. In failing to find and hold that as the grant of Congress was of a specific number of sections, it was intended that the beneficiary was to receive, if possible, the full amount granted.

3. In failing to find and hold that the power of approval vested in the Secretary of the Interior over indemnity selections made in satisfaction of a grant of Congress to aid in the construction of a railroad, is judicial in its nature, and for the protection of the United States against an improper appropriation of its lands; and that such power cannot be arbitrarily used in diminution, or to accomplish a partial forfeiture, of the grant.

4. In holding that no right to an odd-numbered section
18 within the indemnity limits of a railroad grant, and needed in partial satisfaction of the grant, attaches upon the selection thereof, nor until the selection thereof has been formally approved by the Secretary of the Interior.

5. In holding that lands within the indemnity limits of a railroad grant, actually selected by the grantee, and of the character subject to such selection, and needed in the partial satisfaction of the grant, may, nevertheless, thereafter, be withdrawn and reserved to the United States, and the indemnity selection thereof thereby defeated.

6. In failing to find and hold that a withdrawal and reservation of lands needed in partial satisfaction of a railroad grant, already earned by construction of the road, amounts to a partial forfeiture of the grant by Executive action.

7. In failing to find and hold that the act of Congress, approved June 25, 1910, (36 Stat., 847), authorizing the withdrawal of lands for power-site purposes is limited to the public lands of the United States; and does not include lands within the limits of a railroad indemnity grant, to which the right of selection has attached by the building of a railroad, such lands being needed in partial satisfaction of the grant, in lieu of lands lost to the grant within the primary or place limits, and where such lands have been selected by the railroad grantee, and such selection is pending merely awaiting formal

approval for patent at the time of the attempted withdrawal and reservation of such lands.

8. In holding that the selection made by appellant, on February 24, 1910, of the lands involved in this suit, the same being non-mineral in character, designated by odd-numbers, within the indemnity limits of a railroad land-grant, and of the character subject to such selection, and needed in partial satisfaction of the grant, is nevertheless, defeated by the attempted withdrawal or reservation of said lands made in its own favor by the United States, the grantor thereof, for power-site purposes, November 25, 1911.

9. In discharging the rule to show cause and in granting defendants' motion to dismiss plaintiff's bill filed for the purpose of restraining the defendant from cancelling plaintiff's selection of lands needed in partial satisfaction of its grant, said lands being of the character subject to selection under the grant.

10. In failing to grant to plaintiff the relief prayed against the acts of defendants in attempted diminution and forfeiture of plaintiff's grant, fully earned by construction of the railroad as provided for in the granting act.

11. In failing to grant the injunction prayed for by appellant, and in dismissing its bill of complaint.

12. Other errors appearing on the face of the record herein.

A. A. Hoehling, Jr.,
Attorney for Appellant.

Service of copy of the above assignments of error acknowledged, this 26 day of July, 1916.

C. Edward Wright,
Attorney for Defendants.

19 *Designation of Record on Appeal.*

Filed July 28, 1916.

* * * * * * *

To John R. Young, Esq., Clerk Supreme Court, D. C.

Dear Sir: On behalf of the above named Central Pacific Railway Company, a corporation, plaintiff and appellant, I request that you will cause to be prepared the transcript of record on appeal in the above entitled cause; and I hereby designate the following to be included in said transcript:

1. Bill of complaint, and all exhibits attached thereto, the same being marked Exhibits A, B, C, D, and E.
2. Rule to show cause.
3. Return of defendants to rule to show cause.
4. Motion of defendants to dismiss the bill of complaint.

5. Opinion of court.
6. Decree discharging rule to show cause, and dismissing the bill of complaint, including endorsement thereon of appeal in open court and order fixing amount of appeal bond for costs.
7. Assignments of error.
8. Memorandum of approval and filing of bond for costs on appeal.
9. This designation.

A. A. HOEHLING, Jr.,
Attorney for said Appellant.

Service of copy of above designation acknowledged, this 26 day of July, 1916.

C. EDWARD WRIGHT,
Attorney for Defendants.

Memorandum.

July 27, 1916.—Bond on appeal for $100 approved and filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 33, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 33481 in equity, wherein Central Pacific Railway Company, a corporation, is plaintiff, and Franklin K. Lane, Secretary of the Interior, et al., are defendants, as the same remains upon the files and of record in said court.

20 In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 15th day of August, 1916.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*
By ALF. G. BUHRMAN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3012. Central Pacific Railway Company, etc., appellant, vs. Franklin K. Lane, etc., et al. Court of Appeals, District of Columbia. Filed Sep. 8, 1916. Henry W. Hodges, clerk.

21 Thursday, March 8th, A. D. 1917.

* * * * * * *

CENTRAL PACIFIC RAILWAY COMPANY, A CORPORATION, appellant,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office. } No. 3012.

The argument in the above-entitled cause was commenced by Mr. A. A. Hoehling, Jr., attorney for the appellant, and was continued by Messrs. C. D. Mahaffie and C. E. Wright, attorneys for the appellees, and was concluded by Mr. A. A. Hoehling, Jr., attorney for the appellant.

22 In the Court of Appeals of the District of Columbia.

CENTRAL PACIFIC RAILWAY COMPANY, A CORPORATION, appellant,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, appellees. } No. 3012.

(Opinion of the court per Mr. Justice Van Orsdel.)

This suit was filed in the Supreme Court of the District of Columbia by appellant, Central Pacific Railway Company, to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from rejecting and cancelling a list of indemnity railroad lands selected in California.

It appears that the tract of land here in suit, consisting of ninety acres, was selected by plaintiff company February 29, 1910, by list filed in the local land office at Redding, California. The list was certified on March 5, 1910, to the General Land Office, where it remained pending action by the Commissioner until January 16, 1915, when it was held for rejection and cancellation upon the sole ground that the land in question had been included in a water-power-site reserve by Executive order on November 25, 1911, and subsequently withdrawn by the Commissioner, which action was thereafter approved by the Secretary of the Interior.

The selection was made by authority of an act of Congress, approved July 25, 1866 (14 Stats. L., 239), entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon." Section 2 of the act, among other things, provides: "That there be, and hereby is, granted to the said companies, their successors, and assigns, for the purpose of aiding in the construction of said
23 railroad and telegraphic line, and to secure the safe and speedy

transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line." The above is what is known as the grant of primary or place lands, the title to which passed as of the date of the grant. Van Wyck vs. Knevals, 106 U. S., 360.

The act further provides that "when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railway, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified."

The act of Congress of June 25, 1910 (36 Stats. L., 847), under which, by Executive order, the land in question was sought to be withdrawn for a power site, among other things, provides "That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force
24 until revoked by him or by an Act of Congress." The act specifically excludes from its operation "any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act, and * * * all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law."

It is averred by plaintiff company in its bill that the "lands, so sought in indemnity selection by it, are parts of an odd-numbered section within the limits of the indemnity grant so contained in said act of July 25, 1866, supra; and that, at the date of filing said list of selections in the local land office, as aforesaid, the same were vacant, unoccupied, unappropriated lands, non-mineral in character, and free and clear of and from the claim of any person whomsoever, and were not embraced in any reservation theretofore made either by the President of the United States, by Congress, or by any of the executive departments of the Government of the United States;

and the tracts aforesaid were and are needed by plaintiff in partial satisfaction of the grant aforesaid."

This averment is admitted by defendants in the motion to dismiss the bill, but they aver, in justification of their attempted rejection and cancellation of the selection, "that, under existing law, no right to land within the indemnity limits of its grant vests in the plaintiff under any selection thereof made by it under the authority of any act of Congress until such selection has been duly approved by the Secretary of the Interior; and that as to the land selected by the plaintiff as set forth in the bill herein filed the Secretary of the Interior, by operation of the Executive order duly made by the President of the United States withdrawing said land from settlement, location, sale, or entry, is, and since November 25, 1911, has been without any authority to approve the selection list filed
25 by the plaintiff in so far as it includes the land described in the bill aforesaid." It is pointed out in the motion that lands embraced in railroad indemnity lists are not excluded from the provisions of the power-site act.

The right of selection conferred upon the railroad company is a contractural right created by the act of Congress between the United States and the company. Considering the nature of the statutory contract thus created, the court, in the case of Burke vs. Southern Pacific R. Co., 234 U. S., 669, 680, speaking through Mr. Justice Van Devanter, said: "Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct, and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractural relations that the terms of the proposal became obligatory on both. Menotti vs. Dillon, 167 U. S., 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described."

It will be observed that the act of Congress under which the land in question was withdrawn as a power site was enacted and withdrawal made after selection by plaintiff company but while the list was awaiting approval by the Secretary of the Interior. The principal question presented, therefore, is, When does a vested in-
26 terest in the railroad company attach to indemnity lands—at the date of selection or at the date of approval? This question has been before the Supreme Court of the United States in many

cases. Ryan vs. Pacific R. Co., 99 U. S., 382; Grinnell vs. Railroad Co., 103 U. S., 739; Kansas Pacific vs. Atchison Railroad, 112 U. S., 414; St. Paul Railroad vs. Winona Railroad, 112 U. S., 720; Barney vs. Winona, etc., Railroad Co., 117 U. S., 228; Sioux City Railroad vs. Chicago Railway, 117 U. S., 406; Wisconsin Railroad Co. vs. Price County, 133 U. S., 496; United States vs. Missouri, etc., Railway, 141 U. S. 358; New Orleans Pacific Railway vs. Parker, 143 U. S., 42; Hewitt vs. Schultz, 180 U. S., 139; Clark vs. Herrington, 186 U. S., 206; Oregon, etc., R. R. Co. vs. United States, 189 U. S., 103.

An examination of the above cases disclosed considerable uncertainty as to the exact date when the right of a railroad company attaches under an indemnity selection. In referring to the date, the court in some instances uses the term "selection"; in others, "selection under direction of the Secretary of the Interior," and in others, "selection with the approval of the Secretary of the Interior." A careful analysis of these decisions, however, discloses an agreement of opinion that the controlling date from which the prior rights of contesting claimants attach is the date of selection. Of course, that these selections should be made "under the direction" or "with the approval" of the Secretary is important for the protection of the Government. After a selection list has been filed, it remains for the Secretary, in his general supervisory capacity over the disposal of the public lands, to investigate and determine whether the lands are subject to selection under the act, and whether the company is entitled to make a selection. But this investigation and approval has nothing to do with fixing the date when the railroad company's interest vests any more than in the case of a homestead entryman whose interest vests from the date of making final proof and receiving
27 his final certificate from the officials of the local land office. The duty still remains in the Secretary of examining into the question of whether or not the homesteader has complied in good faith with the requirements of the law; but when it is found that he has, nothing remains for the Secretary but the ministerial act of issuing a patent, which evidence of title relates back to the date of the final certificate.

Indeed, this power of direction or approval by the Secretary of the Interior in the railroad land grants would have existed without any statement to that effect in the acts of Congress. "It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect of any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary." Bishop of Nesqually vs. Gibbon, 158 U. S., 155, 167.

The learned justice below turned this case upon the decision in Sjoli vs. Dreschel, 199 U. S., 564. In that case the court, speaking

through Mr. Justice Harlan, said: "That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preemption and homestead laws of the United States; and, that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits within the company's road."

28 This language seems on first impression to be conclusive of the point under consideration, and seems to have so affected the rule of procedure established in the Land Department that the Secretary called upon the Attorney General for an opinion as to the application of the decision. The Attorney General (25 Opinions Attorney General, 632), directed that the decision should be applied only to cases where the facts were similar to those in the Sjoli case. This brings us to the facts in the case. Sjoli settled, erected buildings and moved his family on to the land in 1884. In 1889 he applied to the local land office to make entry of the land under the homestead laws. The application was rejected because the land was then erroneously supposed to be within the granted limits of the St. Paul, Minneapolis & Manitoba Railroad Company. Sjoli, still residing upon the land, in 1895, "relying," as stated in the opinion, "upon his settlement in 1884," again applied to enter the land under the homestead act, and was accepted. Thereafter he made final proof, and in due course a patent was issued to him. In 1885, one year after settlement by Sjoli, the railroad company included this land in an otherwise valid indemnity selection. Thereafter it sold the land to Dreschel, who brought the suit. On this state of facts, light is thrown upon the decision. Sjoli was a settler on the land at the date the railroad company filed its selection, a settlement which was never abandoned. He had acquired a prior right over the railroad company. His right to make a homestead entry of the land, and by compliance with the requirements of the homestead laws have the inchoate title initiated by settlement ripen into a valid title, dated from the time of settlement, a year before the railroad company made its selection. The decision is, therefore, in accord with both former and subsequent decisions that a settler on indemnity railroad lands at the date of selection by the railroad company has the prior right. The language used in the decision as to the date when a vested interest attaches was unnecessary to a determination of the case.

29 The question here involved of the exact date on which the interest of a railroad company vests in lands embraced in a valid indemnity selection was for the first time squarely decided in the case of Weyerhaeuser vs. Hoyt, 219 U. S., 380. The court, speak-

ing through Mr. Chief Justice White, said: "It is beyond dispute on the face of the granting act of July 2, 1864, c. 217, 13 Stat., 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat., 378, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. * * * The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection when made should not include lands which at that time were subject to the rights of others. The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action by the Secretary."

The facts there were that the Northern Pacific Railroad Company filed an indemnity selection list covering the land in suit, which was erroneously cancelled by order of the Secretary of the Interior. Thereafter one Jones applied to purchase the land under the timber and stone act, made final proof, paid the purchase price, and received a receipt from the local land office. The error in cancelling
30 the selection list was occasioned by a misapprehension of the Secretary as to the location of the eastern terminus of the Northern Pacific Railroad, which was finally determined in Doherty vs. Northern Pacific Ry. Co., 177 U. S., 421. Following this decision the Secretary cancelled the entry of Jones, reinstated the lists of selection previously filed, and patented the lands to the railroad company. The railroad company conveyed the land to Weyerhaeuser, and Jones conveyed his interest to Hoyt. Hoyt began suit on the ground that Weyerhaeuser held the title in trust for him. The Circuit Court of Appeals for the Eighth Circuit sustained Hoyt's contention upon the authority of the decision in the Sjoli case.

The decisions in the Sjoli and Weyerhaeuser cases seem at first blush to be in direct conflict—the former decision holding that the right of the railroad company attaches under a valid indemnity selection at the date of approval by the Secretary of the Interior, the latter decision that it attaches on the date of filing the selection list. This apparent conflict is conclusively disposed of in the Weyerhaeuser decision, where the chief justice reviews the cases prior to the Sjoli decision, and after stating the facts in that case, concludes as follows: "What we have already said as to the Sjoli case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration, nor even by way of *obiter* was an opinion expressed on such question. Indeed,

all the cases relied upon may be placed in one of three classes: *a*, those involving the nature and character of the right, if any, to indemnify lands prior to selection; *b*, whether such lands, after the filing of a list of selections and before action by the Secretary of the Interior thereon, could be taxed by a State to the railroad company as the owner thereof; and, *c*, those which were concerned with the nature and character of acts which were adequate to
31 initiate a right to public lands which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was the well-settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred to expounding the doctrine of relation were approvingly cited or expressly reaffirmed. The *Sjoli case*, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which when separated from its context and disassociated from the issues which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohens vs. Virginia, 6 Wheat., 399, so often since reiterated and expounded by this court, to the effect that 'General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.' The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the *Sjoli case* of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the *Sjoli case* are not persuasive here clearly results from the demonstration which we have previously made that to apply them would be in effect to destroy the indemnity provisions of the granting act."

The contention that we are without jurisdiction in this case to control the action of the Secretary by injunction is without
32 merit. The discretionary power of the Secretary is not involved. The indemnity list is conceded to be in regular form and to contain land lawfully subject to selection by the railroad company on the date the list was filed in the land office. Rejection and cancelation of the selection list has been ordered because subsequent to selection the land was attempted to be withdrawn by executive order for a water-power site. This selection being in every respect lawful, the act of Congress conferred upon the railway company the right to make it, and upon the Secretary the duty of approving it and accordingly issuing a patent therefor. His discretion ceased with the finding that the selection had been lawfully made. All

further duties were merely ministerial, and the situation could not be changed by invoking the aid of the intervening power-site act and executive order. The rights of the railroad company had become vested by operation of law, and could not be divested without due compensation either by an act of Congress or by an executive order.

To hold that discretionary power exists in the Secretary to reject or cancel a selection list of indemnity lands conceded by him to have been valid at the date of filing the list in the land office, would be equivalent to vesting him with power to disregard an express mandate of Congress. Congress has provided in different ways for the disposition of the public lands, and to hold that when strict compliance has been made with the requirements of the law the Secretary still has discretion to deny rights acquired thereunder, would be equivalent to endowing him with the power to disregard the law and divest the citizen of rights expressly conferred by law.

In the case of Daniels vs. Wagner, 237 U. S., 547, where a lieu-land application, in every respect in compliance with the law, was made and while pending approval by the Secretary other entries were permitted to be made the question of the discretionary power of the Secretary of the Interior in public land matters was
33 exhaustively considered. Since the situation there in respect of discretionary power was on all fours with the present case, we feel justified in quoting at some length from the opinion of Chief Justice White as follows: "This brings us to determine whether the Land Department has a right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so, an authority the possession of which was sustained by both the courts below. In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded, *a*, that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the Land Office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation, and upon the doing and offering to do everything required by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; *b*, that in the particular case the application to enter the lieu land came within the grant of the statute and all that was required by law or lawful regulation was done by the applicant in order to obtain entry, and *c*, that it was the plain duty of the proper authorities of the department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an act of Congress a right is conferred to make an application to entry public land and a duty imposed upon the department to permit the entry, the department is authorized in its discretion to refuse to allow that to be done

which is commanded to be done and thus deprive the individual of the right which the law gives him. And it becomes moreover certain that the necessary result of this assertion is the following:
34 That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation."

It follows from a review of the decisions, and especially of the Weyerhaeuser and Daniels cases, that the right of a railroad company under an indemnity selection is to be determined from the status of the land at the date of selection, and where, as in this case, the selection is in all respects lawful at the time it is made, the right of the company attaches as of that date. The language used in the granting acts—"under the direction of" or "with the approval of" the Secretary of the Interior—merely relates to the general supervisory power of the Secretary to determine whether the selections were lawfully made and if so to approve and issue a patent for the lands selected. The discretion of the Secretary being limited to a determination of the right of the railroad company to make a selection and whether or not the land selected meets the requirements of the granting act, it follows, when the selection is found to be in all respects within the provisions of the act, discretion at that moment ceases and nothing remains for the Secretary but the ministerial duty imposed by the conditions of the act of approving for patent.

It is vigorously urged by counsel for the Government that since patent had not passed from the United States to plaintiff railroad company for the land in question, title still remained in the Gov-
35 ernment, and it was within the power of Congress to withdraw the land, and thus destroy plaintiff's claim. It is undoubtedly true that Congress may do with the public lands as it deems proper. It may withdraw from settlement, grant, or purchase any portion of it so long as it remains public domain and adverse rights have not vested. But it by no means follows that this right of withdrawal continues until title passes by issue of a patent. It continues until the purchaser or grantee, as in this instance, complies with all the required prerequisites which would entitle him to a patent. When that is done, a property right is vested which the Government itself can not take away without making due compensation. As was said in Campbell vs. Wade, 132 U. S., 34, 38: "In the present case, before the act withdrawing the lands from sale, which was equivalent to a repeal of the act authorizing the sale, could be held to impair any vested right of the applicant, he must have done every-

thing required by law to secure such right. Until then no contract could arise in any way binding upon the State. No contract right of the petitioner was therefore violated by its legislation."

As we have endeavored to point out, the railroad company has performed every duty imposed upon it by law, leaving in the Secretary only the ministerial duty of approving the selection list and issuing a patent. By the act of Congress plaintiff company was granted a substantial right in these indemnity lands. It was a grant of power under certain prescribed conditions to make selection of lands to reimburse it for place lands lost by settlement or otherwise prior to the grant. The right to exercise this power of selection exists from the date of the survey of the indemnity land. When the power was lawfully exercised, as in this instance, the company had complied with all the prerequisites essential to establish its right. A contract then existed, the obligations of which could not be impaired even by Congress itself. "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included
36 under the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable." Sinking Fund Cases (Union Pacific R. R. Co. Case), 99 U. S., 700, 718.

Though the right of plaintiff company, as we have shown, rests upon a statutory contract, the same rule is applicable as in the case of a purchaser of public lands under an act of Congress providing the terms upon which they can be disposed of to settlers by the Land Department. The supervisory power of the Secretary only extends to ascertaining whether or not there has been a full compliance with the law. When that is found, or conceded, as here, his supervisory power ceases, and the right of the settler vests. No greater power exists in Congress to interfere with contract rights thus established. "The power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the purchase price of the land, have

been performed by the settler. When these prerequisites have
37 been complied with the settler for the first time acquires a vested interest in the premises occupied by him of which he cannot be subsequently deprived. He is then entitled to a certificate of entry from the local land officers and ultimately to a patent for the land from the United States." Yosemite Valley Case, 15 Wall., 77, 87.

It will hardly be contended that a railroad company under a land grant act acquires a property right inferior to that of an entryman upon the public domain. The railroad company in this instance contracted not only to construct its road, but entered into a continuing obligation to furnish free transportation of Government property and troops. It stands in the legal status of a purchaser, who, by payment of the purchase price, acquires an interest of which he can not be divested even by the Government without due compensation.

Nor is there merit in the suggestion that this is a suit against the United States, and the court is therefore without jurisdiction. The term "public lands," as used in our legislation, describes lands subject to sale or other disposition under general laws. Newhall vs. Sanger, 92 U. S., 761; Bardon vs. Northern Pacific Ry. Co., 145 U. S., 535; United States vs. Buchanan, 232 U. S., 72, 76. It logically follows that when lands have passed out of the public domain and become vested in an individual or corporation they are no longer property of the United States. An action, then, to compel the officers of the Government to perform the duty prescribed by law in recognizing the rights so vested, is neither an action against the United States, nor an action affecting property belonging to the United States. It will not do to say that the injunction will have the effect of nullifying an executive order. If the order was made without lawful authority, it was a mere nullity and entitled to no consideration as
against rights already vested. The proper remedy in such
38 cases is by injunction. Lane vs. Watts, 234 U. S., 525, 540.

The action here is to prevent an abuse of discretion by the Secretary growing out of a misapprehension of his duty under the law. "But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." Cornelius vs. Kessel, 128 U. S., 456, 460.

The rule was even more positively stated in Ballinger vs. Frost, 216 U. S., 240, 249, as follows: "Whenever, in pursuance of the

legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation." This was but an approval of Garfield vs. Goldsby, 211 U. S., 249, 262, where the court said: "There is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

The decree is reversed with costs, and the cause is remanded with instructions to enter a decree restraining defendants from rejecting and cancelling plaintiff's selection list, with directions to
30 vacate the order withdrawing the land in suit for a power site and to approve plaintiff's selection for patent.

Reversed and *remanded*.

40 Monday, April 23rd, A. D. 1917.

* * * * * * *

CENTRAL PACIFIC RAILWAY COMPANY, A Corporation, Appellant,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office.

No. 2012.
April Term 1917.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court with instructions to enter a decree restraining defendants from rejecting and cancelling plaintiff's selection list, with directions to vacate the order withdrawing the land in suit for a power site, and to approve plaintiff's selection for patent.

per Mr. JUSTICE VAN ORSDEL,
April 23, 1917.

41 In the Court of Appeals of the District of Columbia.

CENTRAL PACIFIC RAILWAY CO., A CORPORATION, appellant, vs. FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, appellees.	October term, 1916. No. 3012.

Petition for allowance of appeal.

Come now Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellees in the above-entitled cause, and show that on or about the 23rd day of April, 1917, this court entered a judgment herein in favor of the appellant and against the appellees, reversing a decree of the Supreme Court of the District of Columbia in favor of the appellees, in which judgment of the Court of Appeals certain errors were committed to the prejudice of the appellees, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellees further show that the said judgment of this court is subject to review by the Supreme Court of the United States under the provisions of the first paragraph of section 250 of the Judicial Code in that the jurisdiction of the trial court is in issue.

They further show that said judgment is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of said section 250 in that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the appellees, said appellees being officers of
42 the United States, are drawn in question.

They further show that said judgment is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said section 250, in that the proper construction of the acts of Congress under which appellant claims is drawn in question by the appellees, who were defendants below.

Wherefore, they pray the allowance of an appeal removing this case to the Supreme Court of the United States for the correction of the errors complained of; that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States; and that the mandate of this court be stayed until further order.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

43 In the Court of Appeals of the District of Columbia.

CENTRAL PACIFIC RAILWAY CO., A CORPORATION, appellant,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, appellees.

October Term, 1916.
No. 3012.

Assignment of Errors.

Come now the appellees, by their attorneys, and say that in the record and proceedings of the court of appeals in the above-entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said appellees in this, to wit:

1. That the court erred in reversing the decree of the Supreme Court of the District of Columbia in favor of the appellees and against the appellant and in remanding the cause for a decree restraining the appellees from rejecting and cancelling appellant's selection list and ordering the vacation of the order withdrawing the land in suit as a water-power site and the approval of appellant's selection of said land.

2. That the court erred in not affirming the decree of the Supreme Court of the District of Columbia herein issued.

3. That the court erred in holding that appellant railroad acquired a vested property right in or title to the land in controversy, as against the United States, by the act of filing its selection list embracing said land.

4. That the court erred in not holding that no property
44 rights in indemnity lands accrue to and vest in a railroad, under its grant, as against the United States, unless and until a selection list duly filed is approved by the Secretary of the Interior.

5. That the court erred in failing to hold that at the time when the railroad's selection list was presented to the Secretary of the Interior for approval or disapproval, the President of the United States having withdrawn the land in controversy under the authority of the act of June 25, 1910, the Secretary of the Interior was without power or authority to approve said selection list.

6. That the court erred in failing to find and to hold that Congress in the said act of June 25, 1910, expressly enumerated the particular classes of claims excepted from the operation of a withdrawal made by the President under the terms of said act and that a railroad indemnity selection is not among the enumerated classes.

7. That the court erred in failing to recognize and to hold that any withdrawal of land made by the President under the terms of said act of June 25, 1910, remains, by the express terms of the act, in force until revoked by the President or by an act of Congress.

8. That the court erred in remanding the cause with instruction to enter a decree to compel the Secretary of the Interior to vacate the order withdrawing the land in suit for power-site purposes when as a matter of fact and law, as by the record is disclosed, the withdrawal was the act of the President of the United States and not that of the Secretary of the Interior.

9. That the court erred in ruling that the Executive order made by the President of the United States withdrawing the land in controversy for power-site purposes, under the authority of said act of June 25, 1910, since the said order was made after the filing of the railroad's selection list, was made without lawful authority, is a mere nullity, and entitled to no consideration as against rights held to be already vested in said railroad.

45 10. That the court erred in holding that the United States is not a necessary party to this suit.

11. That the court erred in directing the Secretary of the Interior to approve the railroad's selection list, an act undeniably operating to pass title to the said railroad, in a suit to which the United States is not a party.

Wherefore, the appellees pray that for the errors aforesaid and other errors appearing in the record of said Court of Appeals, the said judgment of said Court of Appeals may be reversed, annulled, and for naught esteemed, and that said cause be remanded to the said Court of Appeals with instructions to affirm the decree of the Supreme Court of the District of Columbia in said suit rendered, or for such further proceedings in said suit as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

(Endorsed:) No. 3012, Central Pacific Ry. Co. vs. Franklin K. Lane, Secretary of the Interior, et al. Petition for allowance of appeal and assignment of errors. Court of Appeals, District of Columbia. Filed May 5, 1917. Henry W. Hodges, Clerk.

46 Saturday, May 5th, A. D. 1917.

* * * * * * *

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, appellant,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office. } No. 3012.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States and to stay the mandate until further order in the above entitled cause, it is by the Court this day ordered that said petition be and the same is hereby allowed.

47 United States of America, ss:

To Central Pacific Railway Company, a corporation, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 5th day of May, in the year of our Lord one thousand nine hundred and seventeen.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service acknowledged:
A. A. HOEHLING, Jr.,
Counsel for Appellee.
May 18, 1917.

48 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 47, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Central Pacific Railway Company, a corporation, appellant, vs. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, No. 3012, April

term, 1917, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of May, A. D. 1917.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.
By MONCURE BURKE,
Assistant Clerk.

(Indorsed on cover:) File No. 25968. District of Columbia. Court of Appeals. Term No. 509. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, vs. Central Pacific Railway Company. Filed May 21st, 1917. File No. 25968.

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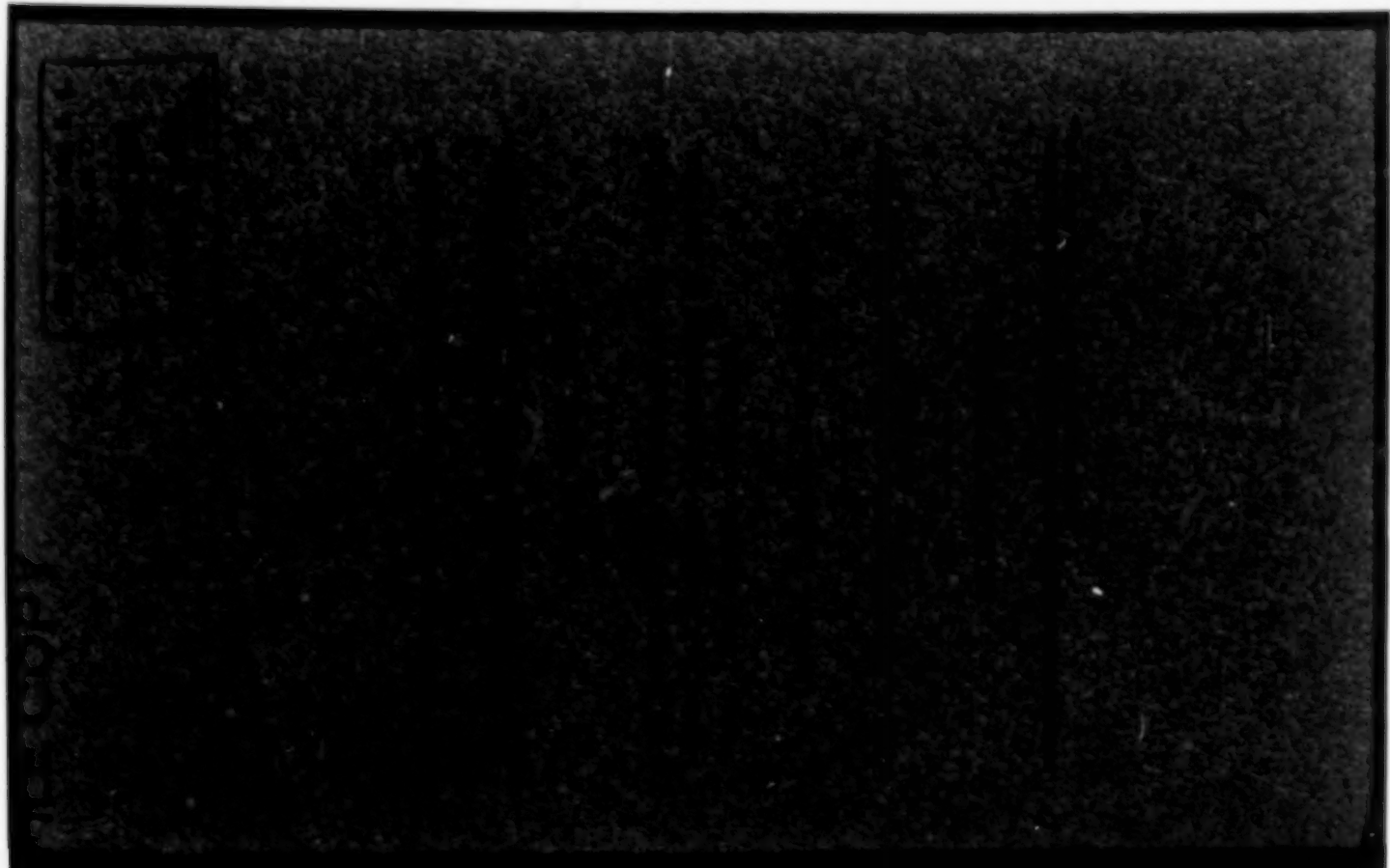

INDEX.

	Page.
STATEMENT	1
ASSIGNMENT OF ERRORS	4
ARGUMENT	7
I. Until approval by the Secretary of the Interior no rights as against the United States are acquired under an indemnity selection list	7
II. The withdrawal of the lands in controversy and their inclusion in a power site reserve was authorized and valid and constituted a bar to the approval of the selection list	14
III. The decree of the Court of Appeals directing an order for the issuance of patent was erroneous, since the United States was not a party and the effect of that decree would be to deprive the United States of the title to its lands	24

STATUTES.

Act of July 25, 1866, 14 Stat. 239	2
Act of March 3, 1875, 18 Stat. 482	11
Act of March 3, 1891, 26 Stat. 1095	20
Act of June 25, 1910, 36 Stat. 847	2, 14, 15
Act of August 24, 1912, 37 Stat. 497	15

CASES.

Benson Mining Co. v. *Alta Mining Co.*, 145 U. S. 428	13
Campbell v. *Wade*, 132 U. S. 34	22
Central Pac. Ry. Co. v. *Lane*, 46 App. D. C. 374	4
Cornelius v. *Kessel*, 128 U. S. 456	13
Frisbie v. *Whitney*, 9 Wall. 187	18, 19
Humbird v. *Avery*, 195 U. S. 480	7

The Central Pacific Railway Company is the successor of the California and Oregon Railroad Company, one of the beneficiaries under the Act of Congress of July 25, 1866, ch. 242, 14 Stat. 239, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon." This Act is in general similar to numerous other Acts of Congress to aid in the construction of railroads. Section 2 granted the odd-numbered sections not mineral to the amount of twenty alternate sections per mile along the line of the railroad, and provided that where such sections were found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands should be selected in lieu thereof, *under* the *direction* of the Secretary of the Interior.

The Railway Company, on February 24, 1910, filed in the local land office at Redding, California, an indemnity selection list for the lands here involved in lieu of lands lost to it in the place limits of the grant. R. 6. Subsequently, but before the list had been passed upon by the Commissioner of the General Land Office or approved by the Secretary of the Interior, the lands in controversy were withdrawn and placed in a power site reserve (Power Site Reserve No. 232) under the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (U. S. Comp. Stats. 1916, Ann. §§4523, 4524, 4525).

In view of that withdrawal, the Commissioner of the General Land Office held said list as to these

lands for rejection and cancellation. Upon appeal, the Secretary of the Interior affirmed that action and adhered to his decision upon motion for a rehearing, whereupon this suit was brought.

The theory of the bill (R. 1–11) seems to be that while the selection of indemnity lands is under the granting Act subject to supervision and approval by the Secretary of the Interior, yet that officer is limited in his supervision to a determination of the right of the Company in the lands selected as of the date of the filing thereof and that conditions at that time are controlling. Further, that subsequent disposition of the lands applied for is not authorized, is in violation of the Company's rights and deprives it of the benefits conferred by the granting Act, and is barred by the construction of the railroad.

As a return to the rule to show cause, a motion to dismiss was filed (R. 15, 16), setting up that the bill did not exhibit a cause for equitable relief; that the withdrawal of the land was made by the President pursuant to an Act of Congress; that an indemnity selection was not one of the classes of claims excepted by said Act from its force and effect; that no rights under such a selection vest until approval by the Secretary of the Interior and that he is now without power to approve in view of the power site withdrawal; that the relief sought would be an interference with the discretionary functions of the Secretary in a matter coming within his jurisdiction;

and finally that title to the lands is still in the United States which therefore is a necessary party and which has not consented to be sued.

The motion was sustained and a decree entered dismissing the bill. R. 17.

Upon appeal, the Court of Appeals reversed the decree and remanded the cause to the Supreme Court with instructions to enter a decree restraining the defendants from rejecting the selection list and directing the approval of the list for patent. R. 32. Opinion of the Supreme Court, R. 16, 17; Opinion of the Court of Appeals, R. 21–32; 46 App. D. C. 374, 382.

The appeal of the defendants brings the cause to this court.

ASSIGNMENT OF ERRORS.

The assignment of errors (R. 34, 35) is as follows:

1. That the court erred in reversing the decree of the Supreme Court of the District of Columbia in favor of the appellees and against the appellant and in remanding the cause for a decree restraining the appellees from rejecting and cancelling appellant's selection list and ordering the vacation of the order withdrawing the land in suit as a water-power site and the approval of appellant's selection of said land.

2. That the court erred in not affirming the decree of the Supreme Court of the District of Columbia herein issued.

3. That the court erred in holding that appellant railroad acquired a vested property right in or title

to the land in controversy, as against the United States, by the act of filing its selection list embracing said land.

4. That the court erred in not holding that no property rights in indemnity lands accrue to and vest in a railroad, under its grant, as against the United States, unless and until a selection list duly filed is approved by the Secretary of the Interior.

5. That the court erred in failing to hold that at the time when the railroad's selection list was presented to the Secretary of the Interior for approval or disapproval, the President of the United States having withdrawn the land in controversy under the authority of the act of June 25, 1910, the Secretary of the Interior was without power or authority to approve said selection list.

6. That the court erred in failing to find and to hold that Congress in the said act of June 25, 1910, expressly enumerated the particular classes of claims excepted from the operation of a withdrawal made by the President under the terms of said act and that a railroad indemnity selection is not among the enumerated classes.

7. That the court erred in failing to recognize and to hold that any withdrawal of land made by the President under the terms of said act of June 25, 1910, remains, by the express terms of the act, in force until revoked by the President or by an act of Congress.

8. That the court erred in remanding the cause with instruction to enter a decree to compel the

Secretary of the Interior to vacate the order withdrawing the land in suit for power-site purposes when as a matter of fact and law, as by the record is disclosed, the withdrawal was the act of the President of the United States and not that of the Secretary of the Interior.

9. That the court erred in ruling that the Executive order made by the President of the United States withdrawing the land in controversy for power-site purposes, under the authority of said act of June 25, 1910, since the said order was made after the filing of the railroad's selection list, was made without lawful authority, is a mere nullity, and entitled to no consideration as against rights held to be already vested in said railroad.

10. That the court erred in holding that the United States is not a necessary party to this suit.

11. That the court erred in directing the Secretary of the Interior to approve the railroad's selection list, an act undeniably operating to pass title to the said railroad, in a suit to which the United States is not a party.

In support of this assignment we submit the following propositions:

1. Until approval by the Secretary of the Interior no rights as against the United States are acquired under an indemnity selection list.

2. The withdrawal of the lands in controversy and their inclusion in a power site reserve, was authorized and valid and constituted a bar to the approval of the selection list.

3. The decree of the Court of Appeals directing an order for the issuance of patent was erroneous, since the United States was not a party and the effect of that decree would be to deprive the United States of the title to its lands.

ARGUMENT.

I.

Until approval by the Secretary of the Interior no rights as against the United States are acquired under an indemnity selection list.

The status of indemnity selections has often been considered by this court and the rule laid down and many times reiterated is, that no title, legal or equitable, to indemnity lands is vested until an application to make selection is filed *and* that application is approved by the Secretary of the Interior. *Sioux City & St. P. R. R. Co.* v. *C. M. & St. P. Ry. Co.*, 117 U. S. 406, 408; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 511, 512, 513; *United States* v. *Missouri, Kansas & Texas Ry. Co.*, 141 U. S. 358, 374, 375; *New Orleans Pacific Ry. Co.* v. *Parker*, 143 U. S. 42, 57, 58; *Osborn* v. *Froyseth*, 216 U. S. 571, 577; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392.

In *Humbird* v. *Avery*, 195 U. S. 480, 507, it was said "this principle is firmly established."

The function of the Secretary in this regard is judicial. *Osborn* v. *Froyseth*, *supra*.

The principle is thus stated in *Wisconsin Central R. R. Co.* v. *Price County, supra,* at pp. 511, 512:

> The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of

> their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

It is necessary to bear in mind that there is a clear distinction between the filing of an application to select and an approved selection. The word "selection" is often commonly used to refer to an application to select and from that arises a misapprehension as to what is meant in many of the adjudicated cases by the expression that title under such a filing vests upon selection. In such cases the word "selection" means approved selection. As was said in *Wisconsin R. R. Co.* v. *Price County, supra* (p. 514): "They [selections] are not considered as made *until they have been approved, as provided by statute, by the Secretary of the Interior.*" [Italics ours.]

What is the effect then of the mere *filing* of an indemnity selection? Its only effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter, unless such latter filing is supported by a settlement or right

initiated previously to the indemnity filing. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387, 388, 391, 392. In other words, the one who is first in time is first in right.

But it is important to note that this principle pertains to the relative rights of individuals seeking to acquire title from the Government but it can not be invoked against the Government itself. This distinction differentiates the instant case from *Weyerhaeuser* v. *Hoyt*, *supra*, and what is said in the opinion in that case as to the doctrine of relation and the scope of the inquiry of the Secretary of the Interior in passing upon the selection must be taken in connection with the question there under consideration, namely, the relative rights of conflicting claimants. It is also important to note that in the *Weyerhaeuser* case the selection had been approved and therefore the doctrine of relation was clearly applicable.

The doctrine of relation involves a legal fiction by which an act performed on a given date is deemed to have been performed at an earlier date. Of course if the act is never performed the fiction can not be indulged. *United States* v. *Detroit Lbr. Co.*, 200 U. S. 321, 334. The failure of the Court of Appeals to bear this in mind caused it to fall into error in its decision, for the opinion shows that it relied as to this point almost entirely upon the authority of *Weyerhaeuser* v. *Hoyt*. In the case at bar there has been no approval of the selection and therefore there

is nothing upon which to base an application of the doctrine of relation.

That the filing of an indemnity selection does not create rights as against the United States is also shown by what is said in the opinion of this court in the case of *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142. The question there was as to the relative rights of a preemption entryman and the railroad company which claimed under the so-called right-of-way Act of March 3, 1875, ch. 152, 18 Stat. 482. The company had submitted for approval by the Secretary of the Interior a map showing the station grounds to which it claimed itself entitled under section 4 of said act. After the map had been submitted and before it had been approved, the filing of the preemptor was made. It was held that the company's rights were superior, but the court in its opinion, used this language, which is particularly significant in the matter which we are now discussing (p. 149):

> The principle is that which has been many times applied in conflicting claims to indemnity lands under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled

> *that while no vested right against the United States is acquired until the actual approval of the list of selections,* the company does acquire a right to be preferred over such an intervener. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, and we can add nothing to the conclusiveness of that case. [Italics ours.]

After referring to and discussing the decision in *Minneapolis, St. Paul &c. Ry. Co.* v. *Doughty*, 208 U. S. 251, this court further said (p. 151):

> What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the Land Office, and the approval thereof by the Secretary of the Interior—and that "*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way," refers to the nonvesting of any right *as against the United States*, and not as denying the priority of right in the acquisition of the premises as *between parties* growing out of priority of application.

But it is asserted by the railway company that when the Secretary of the Interior passes upon an indemnity selection, his inquiry is limited to the conditions existing at the date of the filing of the selection and he can not consider any change in condition after that date.

The basis for this assertion appears to be that by filing its selection list the company "has done all that was required of it" under the law and hence has acquired vested rights which can not be disturbed.

However, the well-established rule that a claimant to public land, who has done all that is required to perfect his claim, acquires rights against the Government, is based upon the theory that by virtue of his compliance with the requirements he has an *equitable title* to the land; that in equity the land is his and the Government holds it in trust for him. *Wirth* v. *Branson*, 98 U. S. 118, 121; *Cornelius* v. *Kessel*, 128 U. S. 456, 459; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432–434.

That rule can have no application to this case for, as we have seen, no *legal* or *equitable* title vested as to the lands sought under the indemnity selection because the same was never approved. It was, therefore, incumbent on the Secretary to ascertain the status of the lands at the time when the indemnity filing was taken up by him for final action. The Court of Appeals, however, erroneously regarded the mere filing of an indemnity selection as vesting an equitable title in the selector, and on that false premise applied the rule laid down as to those who have obtained an equitable title.

II.

The withdrawal of the lands in controversy and their inclusion in a power site reserve was authorized and valid and constituted a bar to the approval of the selection list.

It is definitely settled that the Executive has power without the express authority of Congress to make withdrawals of public lands and to reserve them from appropriation. *United States* v. *Midwest Oil Co.*, 236 U. S. 459.

But in the case at bar we need not rely upon that power for, by the Act of June 25, 1910, ch. 421, 36 Stat. 847, Congress expressly authorized the President to withdraw public lands from settlement, location, sale or entry and to reserve the same for certain purposes, one of which was for water power sites.

Section 1 of that Act (U. S. Comp. Stats. 1916, Ann., §4523), is as follows:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water power sites, irrigation, classification of lands or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

The withdrawal of the lands in question was made pursuant to the authority of this Act. We understand that appellee concedes that this power may be

exercised as to vacant, unapplied-for lands, but insists that it can not be invoked as to the lands in controversy since the filing therefor was made prior to the withdrawal.

The foundation for this contention must be that the filing of the list initiated a claim of such a character that rights thereunder were acquired against which the withdrawal could not operate. That takes us back to the point considered under proposition I, and what we said there is a sufficient answer, we think, to this contention. It might not be amiss, however, to mention these additional matters in this connection. Section 2 of the Act of June 25, 1910, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497 (U. S. Comp. Stats. 1916, Ann., §4524), particularly enumerates the kind of claims or filings which are exempted from the force and effect of such withdrawals. That section reads:

> That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution

of said work: *Provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made; *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

It will be perceived that but five kinds of claims or entries are saved, viz, claims for metalliferous minerals, under the mining laws; oil or gas claims which had not proceeded to discovery but upon which there was at date of withdrawal diligent prosecution of work leading to discovery, thereafter continued to discovery; homestead or desert-land entries, and settlement claims previously initiated.

Now, had Congress intended that other exceptions should be recognized it would have so declared.

That this has been the view and holding of the Land Department is evidenced by its Administrative Ruling in 43 L. D. 293, in which it was declared (syllabus):

> No such right is acquired by a forest lieu, railroad, or State selection prior to approval thereof by the proper officer of the United States, as will except the land from withdrawal by the government under the act of June 25, 1910.

The Secretary said (p. 293):

> This question, therefore, is now presented: Is the Secretary of the Interior free to dispose of these selected lands, in the face of the act of Congress withdrawing them from disposition?
>
> It is my conclusion, after a careful study of the authorities, that no such authority has been given to the Secretary of the Interior. The acts of Congress authorizing exchanges are merely offers on the part of the United States to exchange other lands for lands held by the selector, and the right of the selector does not attach nor equitable title pass upon mere presentation of the requisite papers. There remains the necessity for action upon the offer by the duly authorized officer of the United States. Until that acceptance has been given and the equitable title passed, Congress has full authority to devote the land to a public purpose.

and (p. 294):

> Congress having power to withdraw lands and devote them to a public use, notwithstanding the existence of the inchoate claims mentioned, having authorized the withdrawals and reservations by the act cited, and withdrawals having been made for public purposes, as prescribed in the act, the Secretary of the Interior has no power or authority to approve or accept such selections or exchanges or to relieve them from the force and effect of an existing reservation.

Numerous authorities are cited to support that conclusion. P. 294.

Furthermore, as only an inchoate right was initiated by the filing of the indemnity list, the withdrawal was superior to it and barred its consummation. Such a filing is not like homestead or other claims upon which final proofs have been submitted and the claimant has done all that is required of him under the law, thus vesting him with a title equivalent in equity to that obtained by patent. It bears a closer analogy to a claim based on the preemption law. In *Frisbie* v. *Whitney*, 9 Wall. 187, and *The Yosemite Valley Case*, 15 Wall. 77, the principle was laid down that mere settlement upon lands of the United States with a declared intention to obtain title thereto under the preemption laws does not give a vested interest in the premises so as to deprive Congress of the power to divest it by a grant to another. In *Shepley* v.

Cowan, 91 U. S. 330, it was said, referring to *Frisbie* v. *Whitney* and *The Yosemite Valley Case* (p. 338):

> In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the preemption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the Government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as *against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon the Congress by the Constitution only ceased when all the preliminary acts *prescribed* by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived.

In *Russian-American Packing Co.* v. *United States*, 199 U. S. 570, the Packing Company, without authority or license from the United States, took pos-

session of a tract of land on an island off the coast of Alaska and erected buildings, machinery, etc., at a cost of about $45,000. Subsequently, an Act was passed (Act of March 3, 1891, 26 Stat. 1095, 1100) which provided that a corporation such as the Packing Company might purchase not more than 160 acres of land. Under this act, the Company applied for a survey and made a deposit to cover the cost thereof; the survey was made, but before approval by the Commissioner of the General Land Office, the land was withdrawn and reserved for a fish culture station.

It further appears that by a section of the Act of 1891, it was declared that the provisions relating to acquisition of lands should not be construed to warrant the sale of any lands which should be selected for fish culture stations. The court, referring to that section (14), held that without that section no rights were acquired against the Government, and said (pp. 577, 578):

> Even if section 14 had not been enacted, it would not follow that petitioner, by sections 12 and 13, became entitled to a patent of the United States by procuring a survey of such lands. We have had occasion in several cases to hold that, although the occupation and cultivation of public lands with a view to preemption confers a preference over others in the purchase of such lands by the *bona fide* settler, which will enable him to protect his possession against other individuals, it does not confer a vested right as against the United States in the

land so occupied. Such a vested right, under the preemption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. Until this has been done it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler. *Frisbie* v. *Whitney*, 9 Wall. 187. When this payment is made, the other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local Land Office and ultimately to a patent. *The Yosemite Valley Case*, 15 Wall. 77, 87; *Campbell* v. *Wade*, 132 U. S. 34, 38; *Shiver* v. *United States*, 159 U. S. 491.

Surely, if settlement or occupation of lands give no rights valid as against a subsequent disposition or reservation of the lands by Congress or the President, the mere filing of a selection list will not do so. The settler has always been a favorite of the law, and if his inchoate claims are not excepted, on what theory can it be said that the railway company's are?

Again, in the case of *Wagstaff* v. *Collins*, 97 Fed. (CCA) 3, it was said (p. 8):

> It is urged, however, * * * , that the complainants' ancestor had acquired a vested right in the land by virtue of his homestead claim and residence thereon, of which neither he nor his heirs could be deprived by subsequent legislation, and that the complainants are therefore entitled to the land, to the exclusion of the purchasers from the railway

> company, although Congress clearly intended to confirm the purchasers' title. We are not able to assent to this proposition. In the case of *Shiver* v. *U. S.*, 159 U. S. 491, 495, 16 Sup. Ct. 54, the doctrine was fully approved that an entry upon public lands accompanied by residence thereon, in pursuance of such permission as is given by the land laws of the United States, confers no vested interest in the land until the settler has remained in possession for the length of time or done the acts which under the law entitled him to a patent. Such a settlement, it was said, protects the settler from intrusion by others, but confers no rights as against the United States. This court in *Norton* v. *Evans*, 49 U. S. App. 669, 27 C. C. A. 168, and 82 Fed. 804, 807, also applied the same rule, that had long been applied to preemption claimants, to a homestead claimant, holding that an entry by the latter "creates no vested rights as against the United States, and does not interfere with the power of Congress by subsequent legislation to dispose of the land"; citing *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Campbell* v. *Wade*, 132 U. S. 34, 10 Sup. Ct. 9.

In the case of *Campbell* v. *Wade*, 132 U. S. 34, lands in Texas which had been offered for sale, were withdrawn after a claimant had taken initial action to purchase them. It was said (p. 38):

> In the present case, before the act withdrawing the lands from sale, which was

> equivalent to a repeal of the act authorizing the sale, could be held to impair any vested right of the applicant, he must have done everything required by law to secure such right. Until then no contract could arise in any way binding upon the State.

As to the doctrine of relation, it is undoubtedly true that upon the issuance of a patent or the approval of an indemnity list or a lieu selection, the title acquired relates back to the initiatory steps taken to secure the patent or the approval. But that is not the point here, for no approval has been given.

The doctrine of relation was sought to be invoked in the case of *United States* v. *Morrison*, 240 U. S. 192. That case involved a grant to the State of Oregon of "school sections." A survey had been made in the field, that survey had been approved by the Surveyor General of Oregon, had been submitted to the Commissioner of the General Land Office who called for an additional report on a matter of detail and this report had been furnished. Thereafter, but before formal approval of the survey by the Commissioner, which when given was without change or correction of the survey or plat, the land was temporarily withdrawn for forestry purposes.

In holding that the formal approval of the survey was necessary before the rights of the State attached to the land in controversy, this court said (p. 212):

> Again, it is urged that the survey when approved related back to the date of the

> grant or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey which as we have seen is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. *The doctrine of relation cannot be invoked to destroy this authority.* [Italics ours.]

III.

The decree of the Court of Appeals directing an order for the issuance of patent was erroneous, since the United States was not a party and the effect of that decree would be to deprive the United States of the title to its lands.

The decree of the Court of Appeals was that the Supreme Court of the District of Columbia enter a decree restraining the defendants from rejecting and cancelling the Railway Company's selection list and that they approve the selection list for patent.

Inasmuch as the legal title to the lands in dispute was in the United States, and as the latter was not a party to the suit and had not consented to be sued, that order was erroneous.

The suit was in effect one against the United States, as the result of compliance with the order which the Supreme Court was directed to enter would be to divest the Government of title to its lands. That

was a matter upon which the United States would have to be heard. The case therefore falls within the rulings of this court in *Louisiana* v. *Garfield*, 211 U. S. 70, and *New Mexico* v. *Lane*, 243 U. S. 52.

In the latter case, an original suit in this court, the bill sought an injunction against the Secretary of the Interior restraining him from issuing a patent to one Keepers, for certain lands which he had applied to purchase under the coal land laws, and to which the Secretary of the Interior had adjudged him entitled as against the State which claimed the land as inuring to it under the school-land grant.

In sustaining a motion to dismiss, one of the grounds of which was that the suit was in effect one against the United States, the court said (p. 58):

> The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana* v. *Garfield*, 211 U. S. 70. In that case a bill was brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.
>
> Under the statute it was contended the land vested in the State in fee simple, that is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined

as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a question of law whether the Act of June 21, 1898, had the quality as a grant of the land asserted of it, whether of itself or because of its terms or their prior construction and its adoption, indeed, whether there was such a prior construction or its adoption, and again of the fact of the character of the land at the time of the grant and the evidence of it and the knowledge of it.

CONCLUSION.

As the Company had neither legal nor equitable title to the lands here involved, as the withdrawal cut off whatever inchoate rights had been initiated by the filing of the selection list and as the suit was in effect one against the United States, it follows that the decree of the Court of Appeals, should be reversed, and the decree of the Supreme Court of the District of Columbia should be affirmed.

Respectfully submitted.

FRANK K. NEBEKER,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

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Page

Statement of the case 1
Pleadings 2
The question 3
The land grant 3
Act of July 25, 1866 (14 Stat. 239) 3
Act of June 25, 1868 (15 Id. 67) 4
Act of March 3, 1871 (16 Id. 573) 5
Central Pacific Ry. (20 L. D. 349) 5
Brief 9
1. The statutory contract effected by the act of July 25, 1866 (14 Stat. 239) 9

Authorities:

Bardon vs. Northern Pacific R. R. (154 U. S. 288, 298) 11
St. P. & P. R. R. vs. U. S. (164 Id. 240; 17) 11, 12
Sinking Fund Cases (99 Id. 700, 718-19) 11
U. S. vs. Denver & Rio Grande R. R. (150 Id. 1, 14) 11
U. S. vs. Stanford (161 Id. 412, 427) 11
U. S. vs. Union Pacific R. R. (91 Id. 72, 79) 11
Weyerhaeuser vs. Hoyt (219 Id. 380, 397) 11
Winona & St. Peter R. R. vs. Barney (113 Id. 618, 625) 12
Wisconsin Central R. R. vs. Forsythe (159 Id. at 58) 12

2. The right of a railroad grantee as to any specific tract attach (or, as to primary or plain lands, upon the filing of map of definite location; and (b), as to indemnity lands, upon selection 13
(a) as to primary or plain lands 13

Authorities:

Kansas Pacific Ry. vs. Dunmeyer (113 U. S. 629, 634-5) 13
Van Wyck vs. Knevals (106 U. S. 360, 368) 13

(b) as to indemnity lands 15

Authorities:

	Page.
Atlantic & Pacific R. R. (6 L. D., 84, 92-3)	19
Barney vs. Winona, &c., R. R. (117 U. S., 228, 232)	24
Bishop of Nesqually vs. Gibbon (158 Id., 155, 167)	17
Cedar Rapids, &c., R. R. vs. Herring (110 Id., 27, 39)	23
Clark vs. Herrington (186 Id., 206, 209)	27
Dinwiddie vs. Florida, &c., Ry. (9 L. D., 74)	19
Grinnell vs. R. R. Co. (103 U. S., 739, 742)	23
Hewitt vs. Schultz (180 Id., 139, 157) (2)	19, 27
Kansas Pacific R. R. vs. Atchison, &c., R. R. (112 Id., 414, 421)	24
M., K. & T. Ry. vs. Beal (10 Id., 504)	20
N. O. Pacific Ry. vs. Parker (143 U. S., 42, 57-8)	26
Northern Pacific Ry. (37 L. D., 260, 262)	21
Northern Pacific R. R. (15 Id., 8)	22
Northern Pacific Ry. vs. McComas (250 U. S., 387, 393)	30
Northern Pacific R. R. vs. Miller (7 L. D., 100)	19
O. & C. R. R. vs. U. S. (189 U. S., 103, 113)	27
Osborn vs. Froyseth (216 Id., 571)	29
Ryan vs. Central Pacific Ry. (99 U. S., 382, 386)	21
Santa Fe Pacific R. R. (33 L. D., 161-2)	21
Sioux City, &c., R. R. vs. Chic., Mil., &c., R. R. (117 U. S., 720, 733)	24
Sjoli vs. Dreschel (199 Id., 564)	28
Southern Pacific R. R. (32 L. D., 51, 53-4)	21
Southern Pacific R. R. vs. Bell (183 U. S., 675, 682)	27
Stalker vs. Oregon Short Line R. R. (225 Id., 142)	30
St. Paul, &c., R. R. vs. Northern Pacific (139 Id., 1, 19)	20
St. Paul, &c., R. R. vs. Winona, &c., R. R. (112 Id., 720, 733)	24
U. S. vs. M., K. & T. Ry. (141 Id., 358, 374-5)	26
U. S. vs. Montana Lumber Mfg. Co. (196 Id., 573)	22
U. S. vs. Southern Pacific R. R. (223 Id., 565, 570)	30
Weyerhaeuser vs. Hoyt, supra	28
Wisconsin Central R. R. vs. Price County (133 Id., 511-12)	24

3. The rights of the railroad grantee having lawfully attached to the tracts herein in suit, no power or authority is reserved to or vested in the Secretary of the Interior to devote such lands to other purposes and uses, either public or private, foreign to and in hostility with the grant thereof made by Congress..... 33

Authorities: Page.

Burke vs. Southern Pacific R. R. supra 34
Daniels vs. Wagner (237 U. S., 547, 557-8) 35
Sinking Fund Cases, supra 33
Weyerhaeuser vs. Hoyt, supra 34
Wisconsin Central R. R. vs. Forsythe, supra 33

4. Congress cannot lawfully deprive the railroad grantee of any part of its "indemnity grant" where the rights of such grantee have attached by lawful selection; and, furthermore, the act approved June 25, 1910 (36 Stat., 847), commonly referred to as the Pickett Act, has no proper application in the instant case.... 38

Authorities:

Bardon vs. Northern Pacific Ry. (145 U. S., 538, 543).. 42
Buxton vs. Traver (130 Id., 232, 236) 41
Campbell vs. Wade (132 Id., 34, 38) 41
Frisbie vs. Whitney (9 Wall., 187) 41
Lake Superior, &c., Co. vs. Cunningham (155 U. S., 354, 372) 42
Newhall vs. Sanger (92 Id., 761, 763) 42
Northern Pacific R. R. vs. Smith (171 U. S., 260, 268-9) 41
Shepley vs. Cowan (91 Id., 330, 338) 40
Wilcox vs. Jackson (13 Pet., 498, 513) 39
Yosemite Valley Case (15 Wall., 77) 41

5. The attempted inclusion of the lands here in suit in a power-site reserve, created subsequent to the indemnity selection thereof, should be treated as a nullity; and appellee is entitled to the relief sought herein in protection and preservation of its property rights 43

Authorities:

Burfenning vs. Chicago, St. Paul, &c., Ry. (163 U. S., 321, 323) 44
Lake Superior, &c., vs. Cunningham, supra 44
St. Paul, &c., R. R. vs. Winona, &c., R. R. supra 43
Wirth vs. Branson (98 Id., 118, 121) 44

6. Conclusion 47

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 17.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

CENTRAL PACIFIC RAILWAY COMPANY.

BRIEF FOR APPELLEE.

Statement of the Case.

This suit was filed by the Central Pacific Railway Company, a corporation, against Franklin K. Lane, as Secretary of the Interior, and Clay Tallman, as Commissioner of the General Land Office, to enjoin said public officials from *cancelling* an *indemnity* selection of certain lands in California (90 acres in area), made and filed under the provisions of an act of Congress, approved July 25, 1866 (14 Stat., 239).

By that act Congress made a grant of lands to aid in the construction of a *railroad*, the grant embracing *two* classes of limits: one, *primary* or *place;* and the other, *indemnity*, to supply *losses* sustained from the primary or place lands because of some *prior* lawful claim or right that had *attached* thereto.

The lands in suit, 90 acres, were selected by the railway company February 24, 1910, under the *indemnity* grant, *supra*, by list duly and regularly filed in the United States local land office at Redding (now Sacramento), California; the selection was certified March 5, 1910, by the officers at said local land office, as being in all respects regular and in conformity to law and Departmental regulation; and, furthermore, said list was *approved* by said local officers (R., 13); and thereupon, was transmitted by them to the General Land Office for appropriate consideration and ultimate patenting of the lands to said company (R., 7).

The list remained there pending, without any action having been taken thereon, until January 16, 1915, when the Commissioner of the General Land Office held the same for *rejection* and *cancellation*, upon the ground, and upon that ground only, that the tracts embraced therein, *subsequent* to their selection, had been included in what is known as Power-site Reserve No. 232, created and established by Executive order of November 25, 1911, and *withdrawal* thereunder made by said Commissioner December 9, 1911; said withdrawal having been made under the assumed authority of a certain act of Congress, approved June 25, 1910 (36 Stat., 847), hereinafter more particularly referred to; the action of the Commissioner, in holding said list for rejection, as above, being *affirmed* thereafter by the Secretary of the Interior (R., 8-9).

A *chronological* statement is attached, which will indicate, in concise form, the order of events having a material bearing herein.

Pleadings.

The bill of complaint filed herein set forth the pertinent and applicable facts, and specifically alleged that, at the date of the filing of the selection list aforesaid, the lands so sought as indemnity were vacant, unappropriated, non-mineral in character, free and clear of and from the claim of any person whomsoever, and were not embraced in any reservation theretofore made by the President of the United States, by Congress, or by any of the Executive departments of the Government of the United States; that the tracts so selected were needed in partial satisfaction of the railroad grant; that good, sufficient and valid base was designated of tracts in equal area lost within the primary or place limits of the grant; that the list of selections was accompanied by the fees collectible by law; and that every requirement of the rules and regulations of the Department of the Interior, in respect of making and filing railroad indemnity selection lists, was met (R., 6-7); that the selection was duly certified, both as to the selected tracts and the base designated therefor, by the respective registers and receivers of the local land offices concerned (R., 12-13); and, finally, that the situation above outlined was maintained and continued thereafter, until November 25, 1911, when the tracts so selected were attempted to be included within the limits of power-site reserve No. 232 (R., 8).

The defendants interposed motion to dismiss the bill, thereby admitting the facts above recited; and, in the motion, asserted and contended that, until formal approval by the Secretary of the Interior of a railroad indemnity selection list, the railroad selector acquires and has no right in the lands so selected as against the United States, and that the latter may freely make other disposition thereof for its own uses and purposes, as was done and accomplished, (so the

defendants insisted,) by including the selected tracts within the limits of the power-site reserve aforesaid. The motion further insisted that the relief sought would be an interference with the functions of the Secretary, in a matter involving the exercise of his judgment and discretion; and, further, that the United States is a necessary party to the suit (R., 15-16).

The motion to dismiss was sustained by the trial court, upon the stated ground that no vested right as against the United States is acquired until the actual approval of the list of selections; and decree was entered accordingly (R., 16-17).

Upon appeal by the railway company, the Court of Appeals reached a different and opposite conclusion; and reversed the decree of the trial court, and directed the entry of decree in favor of plaintiff, appellee herein (R., 21-32).

From that decree, the present appeal was taken (R., 36); the propositions relied upon by appellants being, briefly:

> (*a*) No rights are acquired as against the United States under a railroad indemnity selection list until *approval* thereof by the Secretary of the Interior.
>
> (*b*) The withdrawal and inclusion of the lands in a power-site reserve was authorized, and constituted a bar to the approval of the selection list.
>
> (*c*) The United States is a necessary party to the suit.

The above several propositions so relied upon by appellants will be considered in the order stated.

At the outset it may be proper to call attention to the fact that there are now pending before this court several other cases involving similar or related questions, namely:

> No. 18, Northern Pacific Ry. Co. (involving railroad indemnity selections).
>
> No. 128, State of New Mexico (involving State lieu selection).

No. 257, State of Wyoming et al (involving State lieu selection).
No. 325, Northern Pacific Ry. Co. (involving railroad indemnity selection).

The consideration of the propositions above stated will be limited to the particular facts involved in this appeal; the facts and the law applicable thereto being somewhat different in the other said cases.

The Question.

The ultimate question involved in this suit may be thus summarized:

The railway company contends that its right to any particular tract of land within the *indemnity* limits of the grant attaches upon the *selection* thereof; and that the *status* of such land *at the time of selection*, or, as it has been expressed by this court, "at the moment of choice," determines whether the selecting company is entitled to patent therefor. In other words, if such indemnity lands at the time of selection be within the indemnity limits, and are vacant, unappropriated, non-mineral in character, and free from any lawful adverse claim, and be not then embraced within any other appropriation or reservation theretofore made by or on behalf of the United States; and the selection be supported by good, sufficient and valid base; and all requirements of law and Departmental regulation be complied with (all of which conditions are conceded to be here present), the railroad grantee is entitled to the lands so selected.

The appellants, on the other hand, assert and insist that, notwithstanding the fact that a railroad indemnity selection list may be absolutely regular, valid and in good standing *at the time when made* (as is concededly here the case); nevertheless, the United States, at any time thereafter, prior to actual *approval* by the Secretary of the Interior of such

selection list, may make other appropriation of the lands so selected, and devote the same to its own uses and purposes, adverse to the grant, and thereby cut out and defeat the selection.

In stating the above respective contentions, there is excluded from consideration every other element than that above indicated (*e. g.*, whether valid and sufficient *base* has been offered in support of the selection; whether the lands selected are *non-mineral* in character, etc.); and this for the reason that absolutely nothing is involved in this case, in any way affecting the validity or integrity of the indemnity selection involved herein, other than the question hereinabove referred to. In other words, the appellee is entitled to the lands in suit, unless the power-site reserve, created subsequently to the indemnity selection, stands in the way.

While the instant case involves but 90 acres of land, the issue herein presents a question of exceeding importance, not only to appellee, but to all land-grant railroads as well where such grants contain, as many of them do, a provision for *indemnity* lands to supply *losses* sustained within primary or place limits. If the Secretary of the Interior may take away *any* part of the *indemnity* grant in the face of a pending lawful selection list, he, from time to time, may take away *other* parts thereof; and, in the same manner, he may take away from the company the *unpatented* portion of its indemnity grant in its *entirety*, in so far as the same may not be embraced in *approved* selection lists.

The mere statement of any such power or authority as is claimed by appellants herein, so violative of the contract and property rights of appellee, and for which the Government has received full consideration, at once suggests the necessity for careful and serious consideration.

Before discussing the legal questions involved, the provisions of the *land grant* should be fixed in mind.

The Land Grant.

By act of Congress, approved July 25, 1866 (14 Stat., 239), entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," authority was given to the California and Oregon Railroad Company, a corporation organized and existing under the laws of the State of California, to construct a railroad and telegraph line, under certain conditions and stipulations as expressed in said act; and by the *second* section of said act a grant of land was made to certain corporations named in the act, including specifically said California and Oregon Railroad Company, said grant being thus:

> "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line;" etc.

The above constituted the grant of *primary* or *place* lands. Said section of the act then thus proceeded:

> "and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections;" etc.

The above constituted the *indemnity* grant.

Section *four* of the act provided for the issuance of patents to the company upon completion of twenty or more consecutive miles of railroad and telegraph line ready for the

service contemplated by the act, upon report thereof made to the President of the United States by the three commissioners by him to be appointed, such patents to be for the lands granted to the extent of and coterminous with the completed section of the railroad and telegraph line;

> "and from time to time whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued."

Section *five* of said act provided, in part:

> "And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States."

And by section *ten* of said act, all *mineral* lands (other than those containing coal and iron) were *excepted* from the grant.

Said California and Oregon Railroad Company accepted the grant so made to it, as above, and filed its assent in that behalf; and, thereafter, it duly constructed and completed a line of railroad from Roseville, California, to the California-Oregon State line, within the time limited therefor (as extended by a certain further act of Congress, approved June 25, 1868, 15 Stat., 80); and the same was accepted by the President of the United States, after sworn report by the commissioners, as required by the granting act aforesaid; and each, every and all of the conditions, stipulations

and requirements of said land-grant were and have been fully met and satisfied (R., 3).

The Central Pacific Railway is the legal successor in interest of all the rights, titles, properties and franchises of the above-named California and Oregon Railroad Company, including the certain land grant aforesaid; and, as such successor aforesaid, is entitled to the issuance of land patents in its name (R., 4; see, also, Central Pacific Railway Company *et al.*, 29 L. D., 589).

By the provisions of a certain other act of Congress, approved March 3, 1887 (24 Stat., 556), the Secretary of the Interior was "authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted;" and although the fact is that the railroad of said California and Oregon Railroad Company, provided for in the granting act of July 25, 1866, *supra*, has been fully constructed, completed, equipped and operated for a great many years, with all of the incidental benefits to the United States, as fixed and provided by said granting act, the land grant itself remains unadjusted (R., 4-5).

BRIEF.

1.

The Statutory Contract Effected by the Land-Grant Act of July 25, 1866.

The act of July 25, 1866, *supra*, was one entitled—

> "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon."

In order to develop the vast area comprised within the United States, Congress, long years ago, concluded that railroads were needed, both for governmental purposes, such as the transportation of the mails, troops, munitions of war, and public stores and property, and to open up and develop the public lands of the United States by individual settlements thereon; but the railroad construction that was necessarily involved in the enterprise was of such vast magnitude that it was difficult to interest private capital therein without aid of some kind offered by the Government. The latter owned enormous areas of undeveloped, unprofitable, as well inaccessible lands, but which could be made immensely valuable by railroad construction.

The so-called Pacific Railroad laws all related to the same general subject, and the great national object sought to be accomplished by the land-grant acts, namely, the building of transcontinental railroads, is no longer a subject of inquiry in this court.

U. S. *ex.* Union Pacific R. R. (91 U. S., 72, 80).
U. S. *vs.* Stanford (*Id.*, 412, 427).

Thus it was that the Government, through its Congress, desiring to promote railroad construction as above, offered, not freely, but for a consideration, to assist in the matter by a grant of certain *odd*-numbered sections of public land (retaining to itself the intervening *even*-numbered sections, the market value of which it at once doubled), upon condition, however, so far as appellee's grant is concerned, that the railroad should furnish *free transportation* for all time of Government property and troops, as well as certain other benefits and privileges set forth in the granting act, *supra*.

That was the offer, and it was accepted in the manner prescribed, and the company thereupon constructed and equipped the required railroad, and it has ever since operated the same. Furthermore, the railroad company has faithfully kept its part of the contract in all respects, and

has furnished *free transportation* for Government property and troops during the long years that have followed, and in addition, the United States has received and enjoyed all of the other benefits and privileges fixed and provided by the granting act, not to mention the incidental benefits of enormous value that resulted from the construction and operation of the railroad.

Some idea of the magnitude of the above provision and requirement for the free-haul of Government troops and property, for all time, may be gathered from the record in the case of Oregon and California Railroad Company *et al. vs.* United States (238 U. S., 393; volume 5 of the record therein, p. 2404, and Exhibit 288, volume 13, p. 6825).

Having thus fixed in mind some of the practical details of this land-grant contract, and the consideration paid therefor and being paid by appellee, it may be well to consider the legal aspect of the contract.

The nature of the statutory contract between the Government, grantor, on the one hand, and the railroad company, grantee, on the other, has been settled beyond question by prior decisions of this court.

That the contract effected by the land-grant acts is one from which the companies cannot depart, and which the Government cannot change or alter, except in the mode reserved to it by law, was long ago settled by this court in the Sinking Fund Cases (99 U. S., 700, 718-19), where the following was stated on the opinion:

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation

> to aid in the construction of its railroad. * * * The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for subsidy bonds, without the consent of the corporation. All this is indisputable."

The above rule of decision has never been changed, and, in the more recent case of Weyerhaeuser *vs.* Hoyt (219 *U.*, 380, 387), the following was stated as to just what Congress intended to confer in making the indemnity grant:

> "It is beyond dispute on the face of the granting act of July 2, 1864, c. 217, 13 Stat., 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat., 378, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits."

Again, in the case of Burke *vs.* Southern Pacific R. R. (234 *Id.*, 669, 680), wherein was involved a land grant similar to the one here under consideration, this court, in its opinion, referring to the contention there advanced on the part of mineral claimants to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly, thus stated:

> "The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right

and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. *It accepted in the mode contemplated by the act and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both.* Menotti *vs.* Dillon, 167 U. S., 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant should not be treated as a mere gift." (Italics by counsel.)

Again, in the case of Oregon and California R. R. *et al.*, *vs.* U. S. (238 *Id.*, 393, 427), the following was stated:

> "We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command, and are operative and obligatory until repealed."
>
> See, also, Wisconsin Central R. R. *vs.* Forsythe (159 *Id.*, 46, 55, 60).

It may be noted in passing that while it is the settled rule of this court that public grants are construed strictly against the grantees, the rule itself is subject to the limitation that they are not to be so construed as to defeat the intent of the legislature or to withhold what is given either expressly or by necessary or fair implication: Winona and St. Peter R. R. *vs.* Barney (114 U. S., 618, 625).

Thus, in U. S. *vs.* Denver and Rio Grande R. R. (150 *Id.*, 1, 14) it was stated:

> "When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted."

This case, therefore, is to be viewed in the light of the *contract* entered into between the Government and the railroad grantee, the terms of which are binding upon each, and from which neither can depart, save only to the extent, and in the manner, if at all, reserved in the contract.

Starting with the thoroughly established premise, *supra*, it is important, at the outset, to consider that contract in respect of the land grant, and just when the rights of the grantee attach to the lands so granted; and which may be thus stated:

2.

The rights of a railroad grantee as to any specific tract attach (a), as to primary or place lands, upon the filing of map of definite location; and (b), as to indemnity lands, upon selection.

As already noted, the grant under which this controversy arises (and which is quite similar in terms to many other railroad land grants made by Congress) was of *lands* within certain prescribed limits *to aid* in railroad construction. And, as has also been indicated, the grant had a two-fold field of operation, (*a*) lands within *primary* or *place* limits and (*b*) lands within *indemnity* limits, to supply *losses* sus-

tained in the primary or place limits brought about by some *prior* lawful claim thereto.

The first and fundamental question that presents itself in connection with such land grants is, When do the rights of the railroad grantee *attach* to any specific tract of land?

(*a*) *As to primary or place lands:*

There is here no difficulty or uncertainty, since it was long ago adjudged, and the rule of decision has since been repeatedly affirmed, that the rights of the railroad grantee become fixed and vested, in the first instance, at the date of filing the map of definite location of the road opposite thereto; *after which*, no rights adverse to the grant are permitted to attach to any specific tract.

Van Wyck *vs.* Knevals (106 *Id.*, 360, 366).
Kansas Pacific Ry. *vs.* Dunmeyer (113 *Id.*, 629, 634-5).

Further citation of authority upon the proposition above stated is unnecessary, as the rule of decision has been thoroughly settled and uniformly followed, both in the Interior Department and in the courts.

Under the phraseology of such land-grant acts there was no particular difficulty in fixing the exact point of time at which the rights of a railroad grantee should *attach* as to any specific tract of land within *primary* or *place* limits, because, upon the ascertainment of the limits of the grant by the filing of map of *definite location*, it thereby became precisely known whether such primary or place lands were *then* free to pass to the company under the grant, and which thereof, if any, were *then* subject to some *prior* lawful claim that operated to *exclude* them from the grant.

(*b*) *As to indemnity lands:*

Having ascertained, by the application of the above rule of decision, that certain tracts were *lost* to the grant, the

provisions of the *indemnity* grant came into play, and gave the railroad grantee the right *to select*, in lieu of the tracts so *lost*, other tracts of *equal area* and within certain *prescribed limits*.

But at what point of time can it be said that the rights of the railroad grantee definitely *attach* and become *fixed* (subject only to *prior* lawful claims) as to any specific tract within the *indemnity* limits? That, of course, is the real question here involved and presented for determination.

At the outset it is important to fix in mind just what the granting act here under consideration (July 25, 1866, 13 Stat., 365), provided in respect of the duty and authority of the Secretary in administering the grant. That act provided that the indemnity selections shall be made "under the direction of the Secretary of the Interior." Similar provisions are found in other railroad land grants made by Congress (*e. g.* Northern Pacific, 13 Stat., 365; Southern Pacific, 14 *Id.*, 292; Oregon Central, 16 *Id.*, 94; Texas Pacific, 16 *Id.*, 573). The word "approval" was not used in those acts.

In some of the land grants made by Congress to the States in aid of railroad construction, the right of indemnity selection was made to be subject "to the *approval* of the Secretary of the Interior (*e. g.*, to the State of Michigan, 11 Stat., 21; to the Territory of Minnesota and to the State of Alabama, *Id.*, 195; to the State of Wisconsin, 13 *Id.*, 66).

On the other hand, certain other acts of Congress providing for lieu selections of lands contain no express provision concerning either direction or approval by the Secretary of the Interior (*e. g.*, act of June 22, 1874, for the relief of settlers on railroad lands; act of June 4, 1897, forest lieu selections; R. S. U. S., 2275-6, State lieu selections; etc.); and yet it could hardly be seriously contended that any of such selections could be lawfully made otherwise than under the supervision and direction of the Secretary of the Interior.

As a matter of fact, a provision of the kind stated, where and when it appears in the granting acts, merely puts in

formal language that which doubtless would be implied without express statement, namely, the general *supervision* with which the Secretary of the Interior is charged in administering the public lands of the United States, including as well the various land grants made by Congress, both public and private. Bishop of Nesqually *vs.* Gibbon (158 U. S., 155, 167).

As a mere matter of departmental procedure, there is practically no difference between primary lists and indemnity lists. Both alike, if in order, come finally before the Secretary in the form of what are termed "clear lists;" and, upon his written approval, the clear list forms the basis of the land patent. Both classes of selections, primary and indemnity, therefore, come under the *direction* of the Secretary; and there would seem to be no good reason to accord to the supervisory direction of the Secretary a greater efficacy in the one class than the other; the true test being, and necessarily so, whether the selection list constituted and was, in fact, a lawful selection *at the time it was filed;* and the ascertainment of the Secretary is, of course, properly directed to that matter.

It surely could never have been intended or contemplated by Congress to vest in the Secretary any right or discretion to accept or reject a perfectly valid and regular indemnity selection list; since, if that were so, what was supposed and certainly intended by Congress to be an absolute grant would be nothing more than a mere conditional grant dependent upon the grace of a public official.

Furthermore, it is to be observed that the title of the railroad grantee to any specific tract or tracts within the indemnity limits is acquired by virtue of the grant, although that is made definite by the selection.

This matter should be fixed in mind, as appellants herein seem to insist its necessary effect, that an approval by the Secretary *creates* the right of the indemnity selector; whereas,

the fact is that the right is found in the land grant itself, made definite and given precision as to any particular tract or tracts by selection thereof duly filed; and the *direction* of the Secretary authorized and required by the land-grant act is simply in ascertainment of the right so theretofore created, as above.

And here it is important to note that, apparently from the beginning of the administration of railroad grants, the Interior Department has charged the local land officers with the duty of carefully and critically examining selection lists filed by railroad grantees; it provided the forms for verification of such lists, and which forms include certificate by the local officers of approval (or otherwise) of the list. (See Departmental Circular No. 15, of January 24, 1867; ditto, of October 15, 1873; ditto, of November 7, 1879; also Regulations of September 22, 1902; etc.) Thus, in the instant case, the local officers certified that "the said list has been filed and approved" (R., 13).

So that the *direction* of the Secretary in respect of the selection list assumes definite form, in the first instance, by the action and decision of his authorized representatives in respect thereof. This, therefore, presents a different situation from the regulations adopted by the Department under the forest lieu act of June 4, 1897, where rule 18 directed the local officers to forward all such applications to the General Land Office for consideration, together with report of the status of the tract applied for. (See Cosmos Co. *vs.* Gray Eagle Co., 190 U. S., 301, 310.)

In developing the matter as to the exact point of time when the rights of the company *attach* under an indemnity selection, it may be useful to consider briefly the departmental administration of railroad land grants as to lands within indemnity limits as the same has obtained during the years.

The land grant here involved, and indeed all similar railroad land grants made by Congress, contained a provision,

in substance, that, upon the filing in the office of the Secretary of the Interior of a map of survey of the railroad, or of any portion thereof not less than a certain number of continuous miles from either terminus (in the present act 60 miles), said Secretary should *withdraw* from sale public lands therein granted on each side of the railroad, so far as located *and within the limits specified.*

Acting under the supposed authority found in such land grants, of the general character just stated, the Secretary of the Interior, from time to time, made withdrawals of lands within *both* primary and indemnity limits; this upon the theory that the granting acts so intended and directed. Had those various withdrawals remained effective as to *indemnity* lands, there would have been no difficulty in preserving to railroad grantees *all* of the lands within *indemnity* limits, unimpaired by the initiation of adverse claims, up to the time when such company selected the same to supply losses.

Later on, however, the Interior Department reached the conclusion that Congress, in making the several railroad land grants, only intended to authorize the withdrawal of lands within primary limits, and did not intend to tie up, for an indefinite period, lands within *indemnity* limits. Accordingly, in 1887, all such withdrawals were vacated and the lands restored (Atlantic & Pacific R. R., 6 L. D., 84, 92-3; *Id.*, 131-133; Northern Pacific R. R. vs. Miller, 7 *Id.*, 102); ; and the above determination and action received the approval of this court, in Hewitt *vs.* Schultz (180 U. S., 139, 157).

...It is interesting to note, however, that the Department in its above changed practice recognized the *prior* right of railroad indemnity selections actually pending at the time of the restoration of the lands so formerly embraced in the withdrawals (Dinwiddie *vs.* Florida, etc., Ry., 9 L. D., 74).

Some of the railroad land grants have been so far adjusted by the Department that it is a present ascertained and determined fact that insufficient lands within indemnity limits

remain to supply losses of primary or place lands; *for example*, the Northern Pacific grant (St. Paul and Pacific R. R. *vs.* Northern Pacific R. R., 139 U. S., 1, 19).

That, however, is not the situation of the present land grant, since, thus far, a deficiency in the indemnity grant has not yet appeared; although, if the departmental action herein be upheld, it will be possible for the Government to apply to its own uses and purposes all or any part of the remaining lands within the indemnity limits in so far as the same may not be embraced in *approved* selection lists.

In cases of this kind, therefore, it is necessary to determine and fix some exact point of time at which it may properly be said that the rights of the railroad grant definitely attach to a specific tract of land within the indemnity limits of the grant.

Eliminating from consideration the fact that the Interior Department, in its earlier administration of railroad land grants, made withdrawals of lands within indemnity limits (a practice subsequently revoked *supra*), it may be stated that the Interior Department has uniformly held: (1) that the right of a railroad grantee does not attach to any specific tract of land within indemnity limits *until selection* thereof; and (2), that the *status* of the tract *at the time of such selection* determines the right, or otherwise, of the grantee to the tract so selected.

That rule of decision has been so frequently announced and followed by said Department that it will only be necessary to refer to a few of its decisions.

Thus, in the case of Missouri, Kansas & Texas Ry. Co. *vs.* Beal (10 L. D., 504), the rule was thus stated (syllabus):

> "Prior to selection, the right to indemnity lands is only a float; and the right acquired by selection is dependent upon the *status* of the lands *at date of selection*, and not at date of withdrawal." (Italics by counsel.)

Again, in the case of Southern Pacific R. R. (32 *Id.*, 51, 53-4) the following was stated:

> "In fact, a railroad *indemnity selection*, presented in accordance with departmental regulations and accepted or recognized by the local officers, *has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws.*"

Without further pursuing the inquiry so far as departmental decisions are concerned, the same rule was again stated in—

Santa Fe Pacific R. R. (33 *Id.*, 161-2).
Northern Pacific Ry. (37 *Id.*, 260, 262).

Having considered the uniform construction placed by the Interior Department upon railroad *indemnity* grants, it next becomes important to ascertain just what construction this court has given to such grants.

Apparently the first leading decision (and which has since been cited many times with approval) wherein the question came directly under review, is that of Ryan *vs.* Central Pacific R. R. Co. (99 U. S., 382, 386), decided in 1878 (and which case, it may be interesting to note, involved the identical *indemnity* land grant here in question). There, this court, speaking of section two of the granting act of July 25, 1866, *supra*, thus stated:

> "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts *until the selection was actually made in the manner prescribed.* (Italics by counsel.)

In other words, it was there held, that the right of the railroad grantee to a specific tract of land within *indemnity*

limits depends upon the *status* thereof *at the time of such selection.*

Pausing at this point for a moment, it may be remarked that, notwithstanding the fact that the railroad grantee bought and paid for its land grant, both primary and indemnity, and will continue to make further substantial payments for it for all time to come in the shape of *free transportation* of Government property and troops, as hereinabove indicated; it is confronted with a situation in respect of its *indemnity* lands that doubtless was never contemplated by Congress when it made the grant, and certainly was not contemplated by the railroad grantee when it entered into the statutory contract aforesaid; but which has been brought about by settled rules of decision no longer open to question; and that situation may be thus stated:

The railroad grantee can acquire no rights in any specific tract of *indemnity* land until actual *selection* thereof; and if, *at that moment of time,* some other lawful claim has attached thereto, or the Government itself has made some other disposition or reservation thereof, that particular tract of indemnity land is *lost* to the grantee.

But that is *not* all: the railroad grantee is not permitted to make selection of *indemnity* (nor indeed of primary) lands *until* the same have been *surveyed* by the Government and a plat of the survey, duly approved, filed in the United States local land office (Northern Pacific R. R., 15 L. D., 8); nor is such grantee permitted to identify either primary or indemnity lands (for purposes of selection) by *private* survey made by it in advance of the Government survey (United States *vs.* Montana Lumber Mfg. Co., 196 U. S., 573).

Furthermore, large areas of the public domain within the limits of railroad land grants, even at this late day, remain *unsurveyed;* and thus it is that the grantee thereof has to await the approved official survey thereof before it can file

its selection lists; and that subjects the grantee to the further risk of loss of its *indemnity* lands by *private* settlement thereon made *prior* to survey, settlement claims being permitted in favor of the settler even on *unsurveyed* lands, and thereafter the latter is given precedence over railroad indemnity selections filed upon survey, as above.

When to all of the above is added the claim here asserted by appellants, namely, in the face of a pending *lawful* indemnity selection made by appellee, the tracts may be taken from it and reserved by the Government for its own uses and purposes, the real substance of the intended grant disappears and leaves but the shadow, and this, too, notwithstanding the fact that this Court has expressly adjudged—

> "that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits."
>
> (Weyerhauser *vs.* Hoyt, *supra.*)

Resuming now the consideration of decisions by this Court following the case of Ryan *vs.* Central Pacific R. R. Co., *supra*, in relation to railroad indemnity grants.

In Grinnell *vs.* R. R. Co. (103 U. S., 739, 742), it was held:

> "As regards the lands to be selected in lieu of those lost by sale or otherwise, it may be that no valid right accrues to any particular section or part of a section until the selection is made and reported to the land office, and possibly not then until the selection is approved by the proper officer."

In the case of Cedar Rapids, &c., R. R. *vs.* Herring (110 *Id.*, 27, 39), this court, speaking of the *indemnity* lands, stated:

> "They are not and cannot be made specific until the grantee's right of selection has been exercised."

In the case of Kansas Pacific R. R. *vs.* Atchison, &c., R. R. Co. (112 *Id.*, 414, 421) the following was stated:

> "The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from the defendant's road, upon certain contingencies. *It gave no title to indemnity lands in advance of their selection.*" (Italics by counsel.)

In the case of St. Paul, &c., R. R. *vs.* Winona, &c., R. R. (*Id.*, 720, 733), the rights of the railroad company as to indemnity were adjudged to have become "vested by its selection of those lands."

In Barney *et al. vs.* Winona & St. Peter R. R. (117 *Id.*, 228, 232), the court, speaking of lands within *indemnity* limits, thus stated:

> "The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, *and the title to which accrues only from the time of their selection.*" (Italics by counsel.)

In Sioux City, etc., R. R. *vs.* Chicago, Milwaukee, etc., R. R. (117 *Id.*, 406, 408), the court stated:

> "But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

Next is the case of Wisconsin Central R. R. *vs.* Price County (133 *Id.*, 511-12). In that case there was involved a grant of lands made by Congress to the State of Wisconsin, May 5, 1864, to aid in the construction of three distinct lines of railway between certain designated points. The grant contained provision for indemnity, in lieu of lands lost to the grant within place limits, the selection thereof to be made by an agent or agents of the State, appointed by the governor thereof; the indemnity selection, however, being

expressly made to be "subject to the approval of the Secretary of the Interior."

One of the questions involved in the case related to the claimed right of the county to tax, as the property of the railroad, lands embraced in pending unapproved railroad indemnity selection lists. The exact character of the decision, in respect of said claimed right of taxation, is sufficiently indicated by the following extract from the opinion therein:

> "But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the Commissioner of the General Land Office to require the company to restore this excess to the Government."

And, again, speaking of the authority and duty of the Secretary in such case, it was stated:

> "This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identi-

> fication; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. *The doctrine, that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court.*" (Italics by counsel.)

Appellants in the instant case seek to give controlling effect to the opinion in the foregoing case as having general application, rather than as having special reference to the particular facts there present. Under the facts of that case, the language employed in the opinion was most pertinent and applicable; but no such situation of fact is involved herein. Here the selecting company is admittedly entitled to the very indemnity lands selected, unless the subsequently created power-site reserve stands in the way.

In United States *vs.* Missouri, Kansas & Texas Ry. Co. (141 *Id.*, 358, 374-5), the following was stated, speaking of the *status* of indemnity lands in railroad grants:

> "We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes."

In New Orleans Pacific Ry. Co. *vs.* Parker (143 *Id.*, 42, 57-8), it was stated:

> "As to lands within the indemnity limits, it has always been held that no title is acquired until the

specific parcels have been selected by the grantee, and approved by the Secretary of the Interior."

In Hewitt *vs.* Schultz (180 *Id.*, 139) the court considered at length the various decisions of the Interior Department showing the construction placed by that department upon railroad land grants; and, among other things, thus held (*syliabus*):

> *"until a valid selection by the grantee was made from the lands within the indemnity limits,* they were entirely open to disposition by the United States, or to appropriation under the laws of the United States for the disposition of the public lands." (Italics by counsel.)

Again, in the case of Southern Pacific R. R. Co. *vs.* Bell (183 *Id.*, 675, 682), the court, after reviewing its prior decisions, announced the following conclusion as deduced therefrom:

> "That to lands within the indemnity limits, the company takes no title until a deficiency in the place limits has been ascertained and the company has exercised its right of selection, with perhaps some rare exceptions."

In the case of Clark *vs.* Herington (186 *Id.*, 206, 209), the following was stated:

> "It is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in *Kansas Pacific Railroad vs. Atchison Railroad,* 112 U. S., 414, 421: 'Until selection was made the title remained in the Government, subject to its disposal at its pleasure." (Citing cases.)

In Oregon & California R. R. *vs.* U. S. (189 *Id.*, 103, 113) the following was stated:

> "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary."

Next followed the case of Sjoli *vs.* Dreschel (199 *Id.*, 564). In that case, the filing of the railroad indemnity selection list preceded the homestead entry in the land office, but the homestead settlement, improvement and cultivation of the land antedated the filing of the indemnity selection. While it is of no immediate importance whether settlement and improvement should confer a right, notwithstanding the failure to enter in the land office; nevertheless, it may be said in support of the settler's right in that case, that the primary grant there involved excepted lands "occupied by homestead settlers," or subject to "other claims or rights." The conditions present in said case, therefore, would have excepted the land had it been within the primary limits, instead of the indemnity limits; and to assume that the same conditions would not except land from an indemnity selection would be to assert a higher and more extensive right under the indemnity provisions than was accorded to the primary provision upon which the indemnity right is based. When the facts of the case are understood the reason for the final holding becomes apparent; although the general language used in the opinion, to the effect that an unapproved railroad indemnity selection list did not stand in the way of the lands being occupied and entered under the homestead laws, led to some subsequent confusion and error on the part of other courts, until later corrected by this court, in the case of Weyerhaeuser *vs.* Hoyt, *supra*, wherein, speaking of the decision in said Sjoli-Dreschel case, it was stated:

> "If it be conceded that general language was used in the opinion in that case which when separated from its context and disassociated from the issues

> which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohens *vs.* Virginia, 6 Wheat., 399, so often since reiterated and expounded by this court, to the effect that 'General expressions in every opinion 'are to be taken in connection with the case in which 'those expressions are used. If they go beyond the 'case, they may be respected, but ought not to control 'the judgment in a subsequent suit when the very point 'is presented for decision.' The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the Sjoli case are not persuasive here clearly results from the demonstration which we have previously made that to apply them would be in effect to destroy the indemnity provisions of the granting act."

The next case in order is that of Osborn *vs.* Froyseth (216 *Id.*, 571); but, in so far as the decision therein was based upon the general language contained in the decision in Sjoli *vs.* Dreschel, *supra*, the matter has been sufficiently explained above, and need not be repeated.

So far as concerns railroad *indemnity* selection lists, next came the case of Weyerhaeuser *vs.* Hoyt, *supra* (the decision wherein will be referred to more at length later on). In the opinion in that case, speaking of such selections, the following was stated:

> "The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made."

And, again, speaking of the power and duty to approve lists of selections conferred and imposed upon the Secretary, it was stated:

> "Possessing that attribute, the authority involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the filing of the list of selections."

The case of United States *vs.* Southern Pacific R. R. Co. (223 *Id.*, 565, 570) is instructive as well as indicative that the doctrine so repeatedly announced by this court is still recognized and followed. The court there stated:

> "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice."

The subsequent case of Stalker *vs.* Oregon Short Line R. R. Co. (225 *Id.*, 142), involved conflicting claims between a pre-emption patent and an approved railroad right of way; and, in announcing the established principle that patent for railroad indemnity lands is effective, by relation, as of the date of the filing of the railroad company's list of indemnity selections, it was added:

> "While no vested right against the United States is acquired until the actual approval of the list of selections, the company does acquire a right to be preferred over such an intervener."

And, finally, in the case of Northern Pacific Ry. *vs.* McComas (250 *Id.*, 387, 393), it was held, that the approval or disapproval by the Secretary of the Interior of railroad lieu land selections is not merely a formal act, but involves the exercise of sound, but not arbitrary, discretion.

The above is intended and believed to be a substantially full list of the prior cases wherein railroad *indemnity* selection lists have come under review by this court; and pertinent extracts from the decisions therein have been quoted for the purpose of convenient reference; and this quite irrespective of whether some of the expressions used therein, if given general application, when separated from the context and facts of the particular case in which the statements were made, make for or against the appellee in the instant case.

It will be observed that, in the decisions above noted, the court sometimes used the expression "selection"; sometimes it spoke of a "selection under the *direction* of the Secretary"; and, again, it referred to a "selection with the *approval* of the Secretary"; but, when those decisions are carefully analyzed, it will be seen that the court fixed upon the *status* of the lands *at the time of indemnity selection* as determining whether the railroad rights *attached* thereto; and when it added the words "under the *direction*," or "with the *approval*" of the Secretary, as it did in some of such cases, it was in recognition of the right of the Secretary (and which is not here controverted), to ascertain and determine whether the selection itself was lawful *at the time it was made*. Nothing is found in any of the above cases recognizing, in the slightest degree, any arbitrary or discretionary right in the Secretary to reject an indemnity selection list that was lawful at the time it was made; and in the instant case it is conceded that the indemnity selection was lawful at the time it was made and at all times thereafter (R., 6-7).

Furthermore, the cases above referred to involved conflicting claims between a railroad grantee and a prior or subsequent settler or entryman, or controversies growing out of conflicting railroad grants; or claim made by a State of its right to tax lands embraced within pending railroad indemnity selection lists; none of them involved the determination of the question here present, where appellants

claim the right to ignore and defeat a pending indemnity selection, rights under which had *attached* in favor of the selecting company, and which selection was absolutely lawful at the time it was made.

The underlying thought, as well expression, in all of the above cases is, that no legal right, on the part of the railroad grantee, is initiated or attaches *until* the filing of an indemnity selection list; and that, at that point, the Secretary is charged with duties that are referred to in the case of Wisconsin Central R. R. *vs.* Price County, *supra*, and which are quasi-judicial in their nature; but that barring such matters (none of which are here present), and if the indemnity selection list be regular, lawful and valid at the time it is made (as it here was and is), the mere matter of its approval by the Secretary is ministerial, involving no reserved discretion in that official to reject the selection and devote the lands to some other purpose, be it private or public, adverse to the railroad grant.

In the brief for appellants filed herein the contention is confidently made that this court, in its said prior decisions, has always meant an "approved selection," and that, in the absence of such approval, the selecting company has acquired no right of any kind which need be respected, save only as concerns the attaching of subsequent private rights, and that the Secretary may withhold his approval to a list otherwise entitled to approval, and apply the lands so selected to the uses and purposes of the Government itself. If that be so, the land-grant contract is clearly not that which it purports and certainly was supposed and intended to be.

Said brief, however, makes no mention of the contract feature of the case and contents itself with the assertion that a lawful railroad indemnity selection means one which has received the Secretary's approval, without which the selection has no binding force against the United States, and that, inasmuch as the selection list in the instant case has never been approved, it must fail.

Having in mind what has been so heretofore decided in respect of railroad indemnity selections, the matter may be further developed in the light of the rights of the selecting company, on the one hand, and the power, authority and duty of the Secretary of the Interior, on the other; and to which matter we now turn.

3.

The rights of the railroad grantee having lawfully attached to the tracts here in suit, no power or authority is reserved to or vested in the Secretary of the Interior to devote such lands to other purposes and uses, either public or private, foreign to and in hostility with the grant thereof made by Congress.

From what has now been stated, it results that the *status* of lands within the *indemnity* limits of railroad grants *at the time of the selection thereof*, or, as otherwise expressed by this court, *"at the moment of choice,"* is the exact point of time at which is to be determined whether such selected tracts are or are not excluded from the operation of the grant.

In the Sinking Fund Cases (99 U. S., 700, 718), it was stated:

> "No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

In the case of Wisconsin Central R. R. *vs.* Forsythe (159 U. S., 46, 60), this court stated:

> "When Congress makes a grant of a specific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land," etc.

In the case of Burke *vs.* Southern Pacific R. R. (234 *Id.*, 669, 680), this court having stated that, by acceptance of the provisions of the land-grant act, the parties were brought into such contractual relations that the terms thereof became obligatory on both, thus proceeded:

> "And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described."

And, again, in the later case of Weyerhaeuser *vs.* Hoyt (219 *Id.*, 380, 387), it was stated:

> "It was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits."

In the above case the Northern Pacific Ry. Co. had filed an indemnity selection list covering certain lands; thereafter one Jones applied to purchase the same lands under the timber and stone act, made his final proof, paid the required purchase money, and received receipt from the local land office. Subsequently, however, the Secretary of the Interior approved said railroad indemnity selection list and issued patent to it, and the company conveyed the lands to Weyerhaeuser. Jones assigned his rights to Hoyt, and controversy then arose between Weyerhaeuser and Hoyt as to their respective rights. The United States Circuit Court of Appeals (regarding the above Sjoli-Dreschel case as authoritative and controlling) decided against the grantee of the railway company; and thus it was that this court was called upon to review its said former decision and to determine whether it was to be regarded as a statement of the law applicable generally, or whether it should be limited in application to a situation of fact such as was present in said

Sjodi-Dreschel case. This court reached the conclusion that the lower court had erred; and having, explained the true import and meaning of its decision in said former case (but which need not here be repeated), stated, as follows:

> "The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection when made should not include lands which at that time were subject to the rights of others. The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the Secretary."

Later on came the decision in Daniels *vs.* Wagner (237 *Id.*, 547, 557-8). That case involved a forest lieu selection, made under the act of June 4, 1897; and the question involved was "whether the Land Department had a right to reject a prior lieu land entry or entries, and award the land to subsequent and subordinate applicants, under the assumption that it possessed a discretionary right to do so, an authority, the possession of which was sustained by both of the courts below."

This court thus disposed of the contention so made:

> "In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded, *a*, that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the land office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation and upon the doing and offering to do everything required by the law or the lawful regulations of the Land Department to be done or offered to be done for

> that purpose; *b*, that in the particular case the application to enter the lieu land came within the grant of the statute and all that was required by law or lawful regulation was done by the applicant in order to obtain entry, and, *c*, that it was the plain duty of the proper authorities of the department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the department to permit the entry, the department is authorized in its discretion to refuse to allow that to be done which is commanded to be done and thus deprive the individual of the right which the law gives him. And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. *When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation.*" (Italics by counsel.)

From the above extended review of the decided cases, it would seem to result (certainly since the decisions in Weyerhaeuser *vs.* Hoyt and Daniels *vs.* Wagner, *supra*), that this court has authoritatively settled, in necessary effect, the following propositions:

> (1) The *status* of lands within *indemnity* limits *at the time of selection*, or, as otherwise expressed, at the *moment of choice*, determines the right thereto, or otherwise, of the railroad grantee;

(2) The right of the railroad grantee *attaches* to *indemnity* tracts where the selection thereof was lawful *at the time it was made;*

(3) The requirement that such indemnity selections shall be made "under the direction of the Secretary of the Interior," or under his *approval*, imposed upon that official the duty of ascertaining and determining whether the selections were lawful *at the time they were made;*

(4) Where the selecting company comes within the grant of the statute (as it here does) and has done all that was required by law or lawful regulation in order to make and perfect its indemnity selection (as it here did), *it becomes the plain duty of the Secretary, under the law, to grant it;* and, finally,

(5) The title of the railroad grantee to lands within indemnity limits is acquired by virtue of the land grant, although made definite by the selection, and the direction of the Secretary of the Interior in respect of such indemnity selections, and his action thereunder, is not the source or creation of title of the company to the lands so selected.

The language of this court in the Daniels-Wagner case, *supra*, may be appropriately repeated here, where, referring to the *discretionary* right there claimed by the Secretary to approve or reject a pending lieu-selection list that was itself perfectly lawful, valid, and in good standing; and, having stated the certain conclusions to which reference is above made, the following was added:

> "When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. * * * When the true character of

the proposition is thus fixed, it becomes unnecessary to go further to demonstrate its want of foundation" (p. 558).

Thus carefully did the court safeguard the rights secured to a forest lieu selector, where the transaction was simply one of mutual exchange of lands of equal value between such selector and the Government; how much stronger are the reasons for applying the same rule and doctrine to the case of a railroad grantee that paid full consideration for the land grant, not only in constructing the railroad, but in the matter of furnishing *free transportation* to the Government for all time for its property and troops, as it is required to do by the terms of the grant (Sec. 6 of the act, *supra*).

Having thus demonstrated that when Congress specified that these railroad indemnity selections should be made "under the direction of the Secretary," it did not clothe that official with any *discretionary* power to reject arbitrarily a *lawful* indemnity selection, it becomes important to consider whether Congress itself would have the right to deprive the railroad grantee of its land grant, or any part of it, where the rights of the latter have attached to specific lands; as well, also, to consider whether Congress has even attempted to do so as to the lands here in suit.

4.

Congress cannot lawfully deprive the railroad grantee of any part of its "indemnity grant" where the rights of such grantee have attached by lawful selection; and, furthermore, the act approved June 25, 1910 (36 Stat., 847), commonly referred to as the Pickett Act, has no proper application in the instant case.

Bearing in mind that this land grant is both a law and contract, and that by performing its part of the contract

the railroad grantee is entitled to performance by the Government, it becomes evident that Congress would have no right to make any change in the title created by the grant of the lands, without the consent of the grantee; and, even conceding that the indemnity grant was in the nature of a float (as expressed in some of the decisions, *supra*) and that, *prior* to a lawful selection made of *indemnity* lands, other disposition may be made thereof (as held, *supra*); nevertheless, it is perfectly well settled, as has been shown above, that the indemnity grant was intended by Congress to be a *substantial* right to land to make up losses sustained in the primary limits; and, that the rights of a railroad grantee to any specific tract or tracts of indemnity land *attach* and become affixed upon a *lawful* selection made thereof, and of which it may not thereafter be deprived.

Thus, in the early case of Wilcox *vs.* Jackson (13 Pet., 498, 513), decided in 1839, this court laid down a rule of decision (ever since followed) in these words:

> "But we go further, and say that, wheresoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

In the instant case, the railroad company had earned the lands here in suit; it identified them by *selection;* and it did everything that was required of it by law or lawful regulation as a prerequisite to the evidence of its title by patent; and the Government, for a valuable consideration, had solemnly agreed to issue the patent. Instead of doing so, however, the Interior Department finally concluded that it would retain the lands for possible power-site purposes,

and thus deprive the railroad grantee of that part of its grant.

This Government contract with the railroad is a title to lands, and title is property. While it is true that the Government is not constitutionally inhibited, as are the States, from passing laws impairing the obligations of contracts; and in a certain sense, it may be said that executory contracts with the Government rest for their support and enforcement upon the sovereign *conscience;* nevertheless, this Court has held, in no uncertain terms, that the United States cannot divest to itself property rights that have vested under a contract.

To permit the Interior Department to take these indemnity lands from appellee, under the facts disclosed by this record, would amount to a recognition of the right of the Government to take the private property of the company for a public use without its consent and without compensation.

It has been shown above that a railroad indemnity selection, presented in accordance with departmental regulations, and accepted or recognized by the local officers, has been uniformly recognized by the land department "as having the same segregative effect as a homestead or other entry made under the general land laws." (Southern Pacific R. R., 32 L. D. 53-4; Santa Fe Pacific R. R., 33 *Id.,* 161-2.)

And that statement received the express approval of this court, by quotation thereof, in its opinion in the case of Weyerhaeuser *vs.* Hoyt, *supra,* (p. 392).

Bearing in mind a situation of the kind embraced in the quotation, and which is precisely the situation here present, the following extract from the opinion of this court, in Shepley *vs.* Cowan (91 U. S., 330, 338), is instructive:

> "the power of regulation and disposition conferred upon the Congress by the Constitution only ceased when all the preliminary acts *prescribed* by law for the acquisition of the title, including the payment

> of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived."

Without further quotation from the cases decided by this court, the following may be cited to the same effect:

Buxton *vs.* Traver (130 U. S., 232, 236).
Campbell *vs.* Wade (132 *Id.*, 34, 38).
Northern Pacific R. R. *vs.* Smith (171 U. S., 260, 268-9).

The cases most frequently cited in support of propositions to the contrary, similar to those advanced by the appellants herein, are:

Frisbie *vs.* Whitney (9 Wall., 187).
Yosemite Valley Case (15 *Id.*, 77).

But neither of those cases is here controlling, since here the selecting railroad company had done all that the law and departmental regulations required and exacted of it to secure the selected lands; whereas, the exact contrary was the situation of fact involved in each of the above cases.

It is, therefore, submitted that, under the facts of this case, and the applicable law, no subsequent adverse disposition of the lands can be made lawfully; and it is submitted that the act of Congress, approved June 25, 1910, *supra*, commonly referred to as the Pickett Act, did not justify the inclusion of these lands in a power-site reserve; and this is so because, *prior* to the passage of the act, and, of course, *prior* to the subsequently created power-site reserve, the lands, by their indemnity selection, as above, had been removed from the category of "public lands."

For the purpose of convenient reference, a copy of said Pickett Act is printed in the appendix hereto.

That act was one entitled:

> "An act to authorize the President of the United States to make withdrawals of public lands in certain cases."

In the body of the act the President was authorized to withdraw temporarily from "settlement, location, sale or entry, any of the *public lands* of the United States * * * and reserve the same for water-power sites," etc.

Not only were the provisions of the act limited in operation to *public lands* of the United States, but, it is to be noted, the same do not even profess to operate on any "selection" of railroad lands, primary or indemnity. Therefore it is quite evident that Congress, in said act, had neither thought nor intention of interfering with lands that distinctly and specifically it had appropriated long ago to aid in railroad construction.

Furthermore, it is thoroughly settled that *general* terms employed in a *subsequent* grant will not be construed as applicable to lands embraced within the terms of a *prior* grant:

> Wilcox *vs.* Jackson, *supra.*
>
> Lake Superior, &c., Co., *vs.* Cunningham (155 *Id.*, 354, 373), and cases cited.

Lands situated as are those here in suit do not fall within the general definition of the term "public lands," as found in the decisions of this court, such as Newhall *vs.* Sanger, (92 U. S., 761, 763); Bardon *vs.* Northern Pacific Ry. (145 *Id.*, 538, 543); and they are specifically removed from that category by the departmental decisions in Southern Pacific R. R. (32 L. D., 51, 53) and Santa Fe Pacific R. R. (32 *Id.*, 151), hereinabove cited, and which express holding to that effect was quoted by this court, with approval, in Weyerhaeuser *vs.* Hoyt, *supra.*

It would seem clear that said act of June 25, 1910, neither has nor was intended to have any application whatever to *indemnity* lands theretofore granted to aid in railroad construction, where such lands were actually embraced in pend-

ing selections, lawfully made and filed; but even if the language of that act can be strained so as to make it apply by implication, it can have no application to the instant case, since here the tracts had been segregated from the "public lands" of the United States by their *indemnity* selection by appellant February 24, 1910, almost four months *before* the passage of said act of Congress and upwards of two years *before* the attempted withdrawal and inclusion of said tracts in a temporary power-site reserve.

It follows, of course, that the action of appellants, and of which complaint is made in this case, finds no lawful support in the Departments's erroneous application herein of said act of 1910.

5.

The attempted inclusion of the lands here in suit in a power-site reserve, created subsequent to the indemnity selection thereof, should be treated as a nullity; and appellee is entitled to the relief sought herein in protection and preservation of its property rights.

In St. Paul, etc., R. R. Co. *vs.* Winona, etc., R. R. Co., *supra,* there was an overlapping land grant made to *two* railroad companies; one thereof filed its selection list of indemnity lands, while the other, without filing any such list, received patent from the Interior Department, the latter having acted upon the theory (erroneous, as it turned out) that it was entitled thereto by reason of *prior* railroad construction. This court, however, held in favor of the company whose selection list had been *filed,* although not approved, stating that it was no answer to say that the Secretary certified lands to the State for the use of the company, since he did so under a mistake of law, and that his erroneous decision could not deprive the railroad company of its rights "which became vested by its *selection* of those lands"; to which were cited numerous prior decisions of this court.

Again, in the case of Burfenning *vs.* Chicago, St. Paul, etc., Ry. (163 U. S., 321, 323), this court having affirmed the established rule of decision that questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final, added the following:

> "But it is also equally true that when by act of Congress a tract of land has been reserved for homestead and pre-emption, or dedicated to any special purpose, proceedings, in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

And, again, in the case of Wirth *vs.* Branson (98 *Id.*, 118, 121), the following was stated in the opinion:

> "The rule is well settled, by a long course of decisions, when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside."

Without further pursuing the matter, it may be stated that the same principle was announced in the later case of Lake Superior, &c., Co. *vs.* Cunningham (155 U. S., 354, 373-4), wherein the numerous prior decisions of this court to the same effect are cited with approval.

It is equally well settled by decisions of the same court that the officials of the Land Department are subject to the

jurisdiction of the courts whenever necessary to preserve and protect the property rights of the citizen.

Thus in the case of Cornelius *vs.* Kessel, 128 U. S., 456, 461), the court thus stated the rule:

> "the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secured a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it" (p. 461).

Again, in the case of Garfield, Secretary of the Interior, *vs.* Goldsby (211 *Id.*, 249, 262) the same doctrine was thus stated:

> "there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

And, finally, in the case of Ballinger, Secretary of the Interior, *vs.* Frost (216 *Id.*, 240, 249) the following was stated:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the

Secretary, he, as all others, is bound by the provisions of congressional legislation."

See, also, School of Magnetic Healing *vs.* McAnnulty (187 *Id.*, 94, 108); Phila. Co. *vs.* Stimson, Secretary, (223 *Id.*, 605); Lane, Secretary *vs.* Watts, (234 *Id.*, 525, 540).

It is therefore respectfully submitted, that jurisdiction properly exists in the courts to protect the railway company in its property right in the lands here in suit; and that the decree sought by the appellee herein in preservation and protection of its rights was entirely proper.

In conclusion, and in reply to the suggestion made by the appellants herein, as it was also made before the Court of Appeals below, the following is quoted from the decision rendered by said Court of Appeals:

> "Nor is there merit in the suggestion that this is a suit against the United States, and the court is therefore without jurisdiction. The term 'public lands,' as used in our legislation, describes lands subject to sale or other disposition under general laws. Newhall *vs.* Sanger, 92 U. S., 761; Bardon *vs.* Northern Pacific Ry. Co., 145 U. S., 535; United States *vs.* Buchanan, 232 U. S., 72, 76. It logically follows that when lands have passed out of the public domain and become vested in an individual or corporation they are no longer property of the United States. An action, then, to compel the officers of the Government to perform the duty prescribed by law in recognizing the rights so vested, is neither an action against the United States, nor an action affecting property belonging to the United States. It will not do to say that the injunction will have the effect of nullifying an executive order. If the order was made without lawful authority, it was a mere nullity and entitled to no consideration as against rights already vested. The proper remedy in such cases is by injunction. Lane *vs.* Watts, 234 U. S., 525, 540" (R., 31).

6.

Conclusion.

It is respectfully submitted that the decree below was correct, and should be *affirmed*.

A. A. HOEHLING,
Attorney for Appellee.

FRANK THUNEN,
C. F. R. OGILBY,
Of Counsel.

APPENDIX.

ACT OF CONGRESS, APPROVED JUNE 25, 1910 (36 Stat., 847).

An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.

Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates; *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act: *And provided further,* That there shall be excepted from the

force and effect of any withdrawal made under the provisions of this act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made; *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

CHRONOLOGY.

1866, July	25. Granting act, primary and indemnity lands, to California & Oregon R. R. (14 Stat., 239).
1870, August	22. Consolidation of California & Oregon R. R. with Central Pacific R. R., under name of latter company.
1899, July	29. Central Pacific *Railway* Company succeeded to all of the rights above consolidated companies, including the land grant, *supra*, and all patents were directed by the Secretary of the Interior to issue in the name of said successor company (29 L. D., 589).

1910, February 24. Tracts involved herein, 90 acres, *selected* by company as *indemnity* under the above land grant.

" March 5. Selection thereof *certified* and *approved* by the Register and Receiver. (See Exhibits "D" and "E," R., 12-13.)

" June 25. Pickett Act, authorizing temporary withdrawals *of public lands* from "settlement, location, sale, or entry" (36 Stat., 847).

1911, November 25. Temporary *withdrawal* of said lands, included in Power Site Reserve No. 232; promulgated by General Land Office, December 9, 1911.

1915, January 16. Commissioner of the General Land Office holds for rejection and cancellation the above indemnity selection, because of the Power Site Reserve, *supra*.

" March 30. Secretary of the Interior *affirms* said decision of the Commissioner (this upon appeal taken by the company).

" May 27. Secretary of the Interior *denies* motion for *rehearing* filed by the company.

" June 3. Bill for injunction filed herein.

SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1920.

John Barton Payne, Secretary of the Interior, et al., Appellants,
vs.
Central Pacific Railway Company.

Appeal from the Court of Appeals of the District of Columbia.

[February 28, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant. The trial court dismissed the bill and the Court of Appeals reversed that decree and directed that an injunction issue. 46 App. D. C. 374. An appeal under § 250, par. 6, of the Judicial Code brings the case here.

The allegations of the bill were admitted by a motion to dismiss, upon which the defendants announced their purpose to stand; and the case as thus made is as follows:

By the act of July 25, 1866, c. 242, 14 Stat. 239, a grant of public lands in California and Oregon was made "for the purpose of aiding in the construction" of a line of railroad from a point in Sacramento Valley to Portland "and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores" over such line. The part of the grant in California was made to the California and Oregon Railroad Company, its successors and assigns, and the part in Oregon to another company. The grant was in present terms—"there be, and hereby is, granted"—and was of "every alternate section of public land, not mineral, designated by odd numbers" within designated limits on each side of the line. With this was coupled a provision that "when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, desig-

nated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections." The line of the road was to be definitely located by filing a map with the Secretary of the Interior; and the work of construction was to be completed in sections of twenty miles within a time named, which was extended to July 1, 1880, by an amendment of June 25, 1868, c. 80, 15 Stat. 80. The completion of each section was to be ascertained and reported by commissioners appointed by the President, whereupon patents for the lands coterminous therewith were to be issued. The railroad was to be and remain "a public highway for the use of the government of the United States, free of all toll or other charges" for the transportation of its property or troops. An assent to the act on the part of each grantee was to be filed within one year after its passage.

The California and Oregon Railroad Company duly assented to the act, definitely located its part of the line by filing the required map, and constructed, completed and equipped that part of the railroad within the extended time. The completion was duly reported by the commissioners and was recognized by the President. In addition, that company and its successors have complied with the act in all other respects. The Central Pacific Railway Company, the plaintiff, became the legal successor of that company in 1899 and holds its rights, title and interest under the grant. The part of the road in Oregon also was completed, but that is not of present concern.

In the process of adjusting the grant it has developed that many of the designated sections in the place limits were lost to the grant by reason of other disposals, homestead settlements and preemption claims antedating the definite location of the line of the road, thereby making it necessary to resort to the indemnity limits to satisfy the grant. The present ascertained losses amount to thousands of acres and it is certain that further substantial losses will develop as the adjustment proceeds. As yet it is impossible to determine even approximately the total losses, because a material part of the grant is still unsurveyed; and this makes it uncertain whether all can be made good from the lands available for indemnity.

The lands in question were selected by means of an indemnity list filed in the local land office February 24, 1910, and the selection was in lieu of losses specified in the list which were actual and entitled the plaintiff to indemnity. The lands selected are in the indemnity limits and admittedly non-mineral, and at the time of selection were such as could be selected to supply the losses specified. The list was accompanied by the requisite sustaining proofs and conformed in all respects to the regulations embodying the directions of the Secretary of the Interior upon the subject. The plaintiff paid the fees collectible thereon and the local land officers approved the list and promptly forwarded it and the accompanying proofs to the General Land Office with the usual certificates and endorsements. It remained pending in that office until January 16, 1915, when the Commissioner ordered its cancelation solely on the ground that in the meantime the selected lands had been included in a temporary executive withdrawal for a water-power site under the act of June 25, 1910, c. 421, 36 Stat. 847. The plaintiff appealed to the Secretary of the Interior and he affirmed the Commissioner's action. A reconsideration was sought and denied, and the plaintiff then brought this suit.

It is not questioned that, had the selection been reached for consideration before the withdrawal, it would have been the duty of the Commissioner and the Secretary to approve it and pass the lands to patent; nor that, if the withdrawal be not an obstacle, it still is their duty to do so. But it is insisted that so long as the selection was without the Secretary's actual approval it gave no right as against the Government and that the withdrawal made while it was as yet unapproved became a legal obstacle to its approval. In this there is an obvious misconception of the office and effect of the selection, and the misconception is particularly shown in the brief for the appellants, where the selection is treated as only a preliminary land application or filing. Counsel there say: "What is the effect then of the mere filing of an indemnity selection? Its only effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter."

Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather to the concluding step of one

who by full compliance has earned the right to receive the title. Referring to a similar grant and the relative obligations of the Government and the grantee, it was said in *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679-680: "The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti* v. *Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described." And speaking specially of the right to indemnity lands under such a grant, it was said in *United States* v. *Southern Pacific R. R. Co.*, 223 U. S. 565, 570: "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the Government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim."

The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits. *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720, 731-733; *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, 687. The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule, announced in Rev. Stat. §§ 441, 453, 2478, that the administrative execution of all public land laws is to be under his "supervision" and "direction". *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act. *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Williams* v. *United States*, 138 U. S. 514, 524; *Daniels* v. *Wagner*, 237 U. S. 547, 557-561; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 392-393. The cases cited as making for a different conclusion respecting the Secretary's discretion were examined and that view of them rejected in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387-388, and *Daniels* v. *Wagner*, 237 U. S. 547, 557-561. In the *Weyerhaeuser* case it was held that the authority conferred on the Secretary respecting the selection of indemnity lands "involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections".

As before shown, this indemnity selection was made in full compliance with the directions promulgated by the Secretary, was of lands subject to selection, and was based on actual losses in the

place limits adequate to sustain it. The railroad then had been constructed and equipped as required by the granting act and nothing remained to be done by the grantee or its successor to fulfil the conditions of the grant and perfect the right to a patent. The rule applicable in such a situation is that "a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof". *Wirth* v. *Branson*, 98 U. S. 118, 121; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432. This rule has been applied and enforced where the Secretary through an error of law declined to approve and give effect to lawful selections and certified the lands for the use of another claimant,—the court saying that the Secretary could not thus deprive the selecting company of "rights which became vested by its selection of those lands." *St. Paul & Sioux City R. R. Co.* v. *Winona & St. Peter R. R. Co.*, 112 U. S. 720.

The act under which the subsequent power-site withdrawal was made is confined to "public lands," a term uniformly regarded as not including lands to which rights have attached and become vested through full compliance with an applicable land law. *Newhall* v. *Sanger*, 92 U. S. 761, 763; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391; *United States* v. *Hemmer*, 241 U. S. 379, 385-386. Besides, to apply the act to the lands in question, lawfully earned and selected as they were, would work such an interference with private rights as plainly to require that it be construed as not including them. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Lytle* v. *Arkansas*, 9 How. 314, 333, 335; *Sinking Fund Cases*, 99 U. S. 700, 718-719; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 400.

We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title. *Ballinger* v. *Frost*, 216 U. S. 240; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *Lane* v. *Watts*, 234 U. S. 525, 540.

Our conclusion is that in giving effect to the withdrawal as against the prior selection, which admittedly was valid when made, the appellants departed from a plain official duty, and that to

avoid the resulting injury to the plaintiff, for which no other remedy is available, an injunction should issue directing a disposal of the selection on its merits unaffected by the withdrawal. Such an injunction, we think, is better suited to the occasion than that indicated by the Court of Appeals. In other respects the decree of that court is

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.